TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 569

FRANK TOT, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 5, 1942.

CERTIORARI GRANTED JANUARY 11, 1943.

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

Appendix to Appellant's Brief

In United States District Court, District of New Jersey

Criminal No. 197c

The United States

vs.

Frank Tot

Docket Entries

1940

July 23—Indictment for Violation of Federal Firearms Act &c.
" 29—Bench Warrant issued.
Aug. 1—Bench Warrant returned (not executed).
Nov. 29—Hearing before Hon. Albert L. Watson, U. S. Dist. Judge, on motion on demurrer.
" 29—Decision reserved.

1941

Jan. 3—Opinion overruling Demurrer &c filed (Watson).
" 22—Trial moved before Hon. Thomas Glynn Walker, Judge.
" 22—Ordered Jury drawn. Ordered Jury sworn. Jury sworn.
" 22—Swearing 5 witnesses.
" 22—Ordered motion to suppress denied.
" 22—Ordered motion for direction of verdict of Not Guilty denied.
" 22—Ordered recess 1 to 2 P. M.

1941 [fol. 2]

Jan. 22—Ordered motion for direction and dismissal of Indictment denied.
" 22—Swearing Deputy Marshall Gyarmati & Bailiff McLaughlin.

1941

Jan. 22—Ordered clerk take verdict in absence of Court.
" 22—Ordered Marshall provide supper for Jurors.
" 22—Ordered bail continued in case of verdict of Guilty.
" 22—Verdict—10 P. M.—Guilty.
" 22—Ordered defendant to appear for sentence Feb. 11, 1941, at 10 A. M. and bail continued.
" 22—Requisition of witnesses. Issuing 1 subpoena. Issuing 1 copy.
" 23—Subpoenas returned (1).
" 27—Trial continued before Hon. Thomas Glynn Walker, Judge.
" 27—Motion to dismiss.
" 27—Swearing 1 witness.
" 27—Decision reserved.
Feb. 11—Ordered off to Feb. 19th, 1941.
Mar. 17—Ordered off 1 week.
Mar. 24—Hearing before Hon. Thomas Glynn Walker, Judge, on motion to set aside verdict and grant a new trial.
" 24—Court reserved decision.
" 31—Order continuing sentence to April Term, 1941, filed (Forman) (Sundry 261a).
Sept. 8—Order continuing sentence to September Term, 1941, filed (Forman) (Sundry 335a).
Oct. 29—Hearing before Hon. Thomas Glynn Walker, Judge, on motion to set aside Verdict and for a new trial.

[fol. 3] 1941

Oct. 29—Ordered term is continued until Court decides the motion (Walker).
Nov. 4—Order continuing sentence to November Term, 1941, filed (Forman) (Sundry 372a).
Dec. 6—Memorandum denying motion to set aside verdict and defendant to present himself for sentence, Monday, 12/15/41, filed (Walker).
" 6—One copy to Attorney General.
" 22—Sentence—Two years in a U. S. Penitentiary, custody Attorney General &c (Walker).
" 22—Ordered that a certified copy of this signed judgment serve as the commitment of the defendant (Walker).

1941
Dec. 22—Warrant of commitment issued. Duplicate.
" 22—Ordered bail fixed at $3,500. on appeal (Walker).
" 22—Notice of Appeal filed.
" 23—Stipulation filed.

IN UNITED STATES DISTRICT COURT

INDICTMENT

UNITED STATES OF AMERICA,
District of New Jersey, ss.:

In the District Court of the United States of America in and for the District of New Jersey, at the April Term thereof, in the year 1940.

The Grand Jurors of the United States of America duly impaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present,

That on or about the 20th day of September in the year 1938, at the City of Newark, in the County of Essex and [fol. 4] State and District of New Jersey and within the jurisdiction of this Court, one

FRANK TOT

whose true and correct name, except as above set forth, is to the Grand Jurors unknown, he having been theretofore on the 22nd day of June A. D. 1925 duly convicted in the Special Sessions Court of the County of Essex, in the State of New Jersey, before Honorable Edwin C. Caffrey, Judge of the said Court, of a crime of violence, to wit, assault and battery with intent to beat, wound and ill-treat one James Johnson, and the said Frank Tot having been on the 15th day of June 1932 duly convicted in the Quarter Sessions Court of the County of Essex, in the State of New Jersey, before Honorable Walter D. Van Riper, of a further crime of violence, to wit, breaking and entering at night into the office building of Guardsmen's Building and Loan Association with intent to steal, to wit, burglary, did knowingly, unlawfully and feloniously receive a certain firearm, to wit, a thirty-two calibre Colt automatic pistol, which said pistol

had been shipped and transported in interstate commerce to the said City of Newark from a place to the Grand Jurors unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(Title 15 § 902 f.)

William F. Smith, Acting United States Attorney.

[fol. 5] In United States District Court, District of New Jersey

Testimony

United States of America

vs.

Frank Tot, Defendant

Testimony

Appearances:

Irwin L. Langbein, Esq., Special Assistant to the Attorney General and

William F. Smith, Esq., United States Attorney for the Government.

George R. Sommer, Esq., for the Defendant.

Tried before Hon. Thomas Glynn Walker, Judge, and a jury on Wednesday, January 22, 1941 at 10 A. M. at the Post Office Building, Newark, New Jersey.

• • • • • • •

Mr. Sommer: He does. If your Honor please, at this time, for the purpose of the record, may I state that a motion was made referring to this particular indictment before Judge Watson; the motion was to cross the indictment on several grounds. That motion was denied in a written opinion of Judge Watson which was handed down within the last week or two, and I would like now for the purpose of the record to be allowed to enter an objection

[fol. 6] to the opinion and ask that an exception be allowed to his ruling.

The Court: The record will show same.

(Exception allowed.)

Forman, [L. S.] U. S. D. J.

Mr. Langbein: Opened on behalf of the Government.

JOHN L. MADALA, called and sworn on behalf of the Government, testified as follows:

Direct examination.

By Mr. Langbein:

Q. What is your occupation, Mr. Madala?

A. I am a Special Agent of the Federal Bureau of Investigation, Department of Justice.

. . . . . .

Q. Directing your attention to the period on or about September 22, 1938, where were you stationed?

A. I was stationed at Newark, New Jersey.

Q. Are you acquainted with a man named Frank Tot?

A. Yes, sir, I am.

Q. Will you point him out, if you see him?

Mr. Sommer: Stand up.

A. That is the man.

Mr. Langbein: Indicating the defendant Frank Tot.

Q. Did you see Frank Tot on or about September 22, 1938?

A. Yes, sir, I saw him on the morning, early morning of September 22, 1938.

[fol. 7] Q. About what time?

A. I will say about 7 A. M.

Q. And where did you see him?

A. I saw him at his home 182 E. Kinney Street on tne 2nd floor.

Q. In what city?

A. Newark.

Q. Right here. Was anyone else present with you at the time that you saw him?

A. Special Agent Abraham Dickstein, Special Agent R. J. Flynn and Special Agent L. F. Malone, all of the Federal Bureau of Investigation.

Q. Was there any search of Mr. Tot's house made on that date in your presence?

A. Yes, sir, there was.

Q. Did you have a warrant?

A. Yes, sir, I did.

Q. I ask whether that is the warrant?

A. Yes, sir, it is.

Mr. Langbein: Offered in evidence.

Mr. Sommer: At this time I would like to cross examine this witness as to this particular piece of paper.

The Court: You may do so.

Cross-examination.

By Mr. Sommer:

(As to Warrant.)

Q. This is not a search warrant, it is?

A. No, sir.

Q. But it is a warrant for the arrest of Frank Tot?

A. That's right.

Mr. Sommer: No objection.

(Received and marked Exhibit G-1.)

Direct examination (resumed).

By Mr. Langbein:

Q. Was anything found in the search of the premises?

A. Yes, there was.

Q. What was it?

Mr. Sommer: Now, I object to any question as to the result of the search or what was found for the reason that [fol. 8] the search was made of a private dwelling without a search warrant, as has been definitely stated by this witness.

The Court: I am overruling the objection.

Mr. Sommer: I pray an exception and ask leave to renew my motion at the end of the Government's case.

The Court: That request is granted.

(Exception allowed and sealed accordingly.)

Forman, [L. S.] U. S. D. J.

A. We found, among other things, a .32 calibre Colt automatic pistol.

Q. Is that the gun? (showing the witness a gun.)

A. Yes, sir.

Mr. Langbein: I offer the gun in evidence.

Mr. Sommer: Of course I object to the admission of the gun upon the same grounds as the previous motion. I assume there will be the same ruling.

The Court: The objection is overruled.

(Received and marked Exhibit G-2.)

Q. Mr. Madala, have you had, in the course of your duties with the Federal Bureau of Investigation, opportunity and occasion to become familiar with the names of guns and their calibres?

A. Yes, sir, to a certain extent.

Q. Can you tell us what the brand name of this gun is?

Mr. Sommer: Well, now, I object to that, the gun speaks for itself.

[fol. 9] The Court: I will permit him to answer it yes or no.

A. It is a Colt .32 calibre.

The Court: No, the question is can you?

The Witness: Yes, sir, I can.

Q. Please tell us——

Mr. Sommer: Now, I object to that.

Q. (Continuing:) What make and calibre——

Mr. Sommer: The gun speaks for itself.

Mr. Langbein: If the Court please, I suppose that at some point on the gun there is a label bearing its name and number, its calibre and number, then a serial number; but the jury isn't familiar with guns. They may not be able to find it and I think that by way of explanation, a simple

statement from the witness who is familiar with such matters would be far superior to having them try and find it for themselves.

The Court: I will overrule the objection.

Mr. Sommer: I am willing to stipulate that the revolver that the witness is holding in his hand, which is marked G-2, is a .32 calibre Colt automatic pistol.

Mr. Langbein: Well, fine. That would be the purpose of my question, to obtain just that information.

Q. Now, can you find a serial number on the gun?

A. Yes, it is indicated there (indicating).

Q. Will you read it out, please?

A. 310977.

[fol. 10] Q. Now, did you have any conversation with the defendant Frank Tot with respect to the gun at the time you found the gun?

A. Yes, sir, I did.

Q. What is that?

A. I did.

Q. Will you tell us what that conversation was?

A. At the time we entered the place and began our search, after he was under arrest, I asked him whether he had a pistol in the room, and he said he did, and I asked him where it was. He says, "Well, I will get it for you." I told him just to tell me where it was and we would get it ourselves. So he told us it was in his coat pocket which was hanging in the wardrobe closet in the bedroom where he was located. I went over to his wardrobe closet and examined the clothes and found this gun in the outside coat pocket of one of his coats. We took the gun out of the pocket and he was watching us and said, "Be careful, it is loaded." So Mr. Dickstein in my presence ejected the magazine which was fully loaded and also pulled back the bolt and found that there was a bullet in the chamber which we ejected right away and then took posses. ion of the gun.

Q. Now, where was Tot, in which room of the house?

A. In the same room.

Q. Where was he when you arrested him?

A. He was in bed in the bedroom and this wardrobe closet was in the same room.

Q. Do you have the magazine and bullets to which you refer?

A. This is the magazine which was in the gun, and as I recall, there were eight cartridges in the magazine and one in the chamber. These are the bullets. There are only six in that.

Q. Only six left?

A. Yes, sir.

Mr. Langbein: I offer the bullets.

Mr. Sommer: Same objection.

The Court: They will be received and marked as one exhibit. How many are there?

[fol. 11] Mr. Langbein: Six bullets.

(Received and marked Exhibit G-3.)

Mr. Langbein: Also the magazine.

(The magazine is received and marked Exhibit G-4.)

The Court: You have objected to the bullets, have you the same objection to the magazine?

Mr. Sommer: Same objection to the magazine.

The Court: Overruled.

Q. That is all.

Cross-examination.

By Mr. Sommer:

Q. Now, on the morning of September 22, 1938, you and four other agents went to the premises 182 E. Kinney Street, Newark, did you not?

A. I and three other agents.

Q. You and three other agents.

A. Yes, sir.

Q. Two of you remained in the front of the house and you and Dickstein went to the rear of the house, didn't you?

A. I think that's right, yes, sir.

Q. And you and Dickstein went up the rear stairs to the 2nd floor of the house, did you not?

A. Yes, sir.

Q. And you then knocked on the door, did you?

A. Yes, sir.

Q. Who opened the door?

A. He did.

Q. Tot did?

A. Yes, sir.

Q. So that when you entered the place he was not in bed at all, was he?

A. He was undressed, I presume he got out of bed.

Q. He was not in bed when you entered that place, was he?

A. No, he was not when he entered the door, he wasn't.

[fol. 12] Q. Well, you know he opened the door, don't you?

A. Yes, sir.

Q. And Agent Dickstein was in charge of the raid, wasn't he?

A. I don't know whether anyone was in charge.

Q. Well, the warrant was in his possession, wasn't it?

A. It was in his possession.

Q. And you went there for the purpose of arresting Tot and searching the premises, didn't you?

A. Yes, sir.

Q. And when Tot opened the rear door to the house, did anyone speak to him?

A. Either Dickstein or myself told him we had a warrant for his arrest.

Q. And you asked him whether he was Frank Tot, didn't you?

A. Yes, sir.

Q. And he admitted his identity?

A. Yes, sir.

Q. And you placed him under arrest?

A. That's right.

Q. Now, into what room does the rear door lead?

A. I believe it is the kitchen.

Q. And in the kitchen you had a conversation with him, didn't you?

A. I don't recall offhand. If you refresh my recollection I may remember it.

Q. Well, after you placed him under arrest the other two agents entered the front of the building, didn't they?

A. I think either Dickstein or myself let them in.

Q. That's right. They came up the front stairs.

A. Yes, sir.

Q. And you went to the front door and let them in?

A. I believe that's right.

Q. And then you proceeded to search the place?

A. Well, yes, shortly, thereafter, yes, sir.

Q. And Dickstein remained in the kitchen with Tot, didn't he?

A. Not during the entire search.

Q. When you started the search.

A. No, he was sitting on the bed or lying in bed; he was—no, he was sitting on the bed with his clothes off. We told him to get dressed, as I recall, in the bedroom.

[fol. 13] Q. Now, as a matter of fact, didn't you bring a suit out of the bedroom and give it to him in the kitchen and didn't he dress in the kitchen?

A. No, my recollection is he dressed in the bedroom. The reason I know that is because we wouldn't go and make the search without the presence of the defendant, so he must have been in the room at the time we made the search in the bedroom.

Mr. Sommer: Now, I move that that be stricken as not responsive.

The Court: May I have the answer?

(Answer repeated by the reporter.)

Mr. Langbein: If the Court please, I don't see anything objectionable in the response. It goes on to explain the grounds of knowledge.

The Court: I will strike from the words "The reason" including said words.

Q. While you were in the kitchen and Dickstein was talking to Tot, he asked him if he had a revolver, didn't he?

A. No, that conversation took place in the bedroom. He was in bed, sitting on the bed dressing, I believe.

Q. Sure it didn't take place in the kitchen?

A. No, I am positive now that you brought it up, that he was in the bedroom sitting on the bed.

Q. If Dickstein testified at a previous hearing in this matter that that conversation took place in the kitchen, then he was incorrect?

A. If he so testified that is his recollection. My recollection is that he was in the bedroom.

Q. And of course this all occurred over two years ago?

A. Two and one-half years ago.

Q. And you say there was a wardrobe in the bedroom?

A. Sort of a wardrobe closet, my recollection.

[fol. 14] Q. And in that closet there was clothing, was there not?

A. Yes, there was several pieces of apparel.

Q. And you opened the closet?

A. Oh, yes.

Q. And you searched the clothing in the closet?
A. Oh, yes.
Q. And in the pocket of one of the coats in that closet you found the revolver which is marked G-2?
A. Yes, sir.
Q. Now, did you have any further conversation with Tot at that time concerning the gun?
A. I asked him if the gun belonged to him.

Mr. Langbein: Object—well, go ahead.

Q. And how did he answer that?
A. He said it did.

Mr. Langbein: Just a moment. I have no objection to that question but when I have an objection pending——
The Court: Withhold your answer until counsel is able to state his objection, if he has one.

Q. Did you have any further conversation with him pertaining to the gun?
A. I asked him where he got it from.
Q. And what did he tell you?

Mr. Langbein: Objection.
The Court: What is the basis for your objection?
Mr. Langbein: That is part of the defense, it seems to me. It is not open now on cross examination, it opens up an entirely different topic. We are resting on the presumption.
Mr. Sommer: Might I say this, your Honor, that the Government, Mr. Langbein on his direct examination asked this witness whether he questioned the defendant Tot about [fol. 15] a revolver. I think I have a right to bring out all of the conversation that took place in that question.
Mr. Langbein: Only insofar as it is relevant to qualify the answers made on direct. There is no rule that you are entitled to bring out everything and anything that may have happened in the conversation.
The Court: I am inclined to sustain the objection.
Mr. Sommer: I pray an exception.

(Exception allowed and sealed.)

Forman, [L. S.] U. S. D. J.

Mr. Langbein: Of course I will have no objection to having Mr. Sommer, if he wishes, make Mr. Madala his own

witness provided whatever testimony there may be there is otherwise admissible.

The Court: Well, we can solve that problem after the Government rests.

Q. Now, the charge that you went there for the purpose of arresting Tot on was not a charge of possession of firearms, was it?

A. No, sir.

Q. That charge was made on a complaint either made by you or Dickstein, wasn't it?

A. Yes, sir, by Agent Dickstein.

Q. And did you ever prosecute Tot on that charge?

A. I don't know. I haven't been in this territory for a year.

Q. Up to the time you left this territory had you ever prosecuted Tot on that charge?

A. I had no knowledge.

Q. Do you know whether there was ever any further proceedings on that charge at all?

A. All I know is hearsay testimony, hearsay information.

[fol. 16] Mr. Langbein: I object to any further questions along this line. I have given counsel latitude on it.

The Court: The objection is sustained.

Q. And Tot, after his arrest and after the search of his apartment, was taken up to your headquarters, was he not?

A. Yes, sir.

Q. And then finally arraigned and charged with the possession of this revolver?

A. Yes, sir.

Q. And prior to going to your headquarters you went to his garage and searched that, didn't you?

Mr. Langbein: Objection.

The Court: I will permit him to answer. I don't know what materiality there is to it.

A. I don't remember searching the garage myself.

Q. That is all.

Mr. Langbein: No further questions. If the Court please, without any preliminaries I offer under the Official Documents Rule certified copy of the record from the Essex County Clerk's Office purporting to bear the usual signa-

tures and seals and purporting to be a transcript of the records of the Court of Quarter Sessions, I believe it is.

The Court: Is it the Guardsman matter?

Mr. Langbein: One is a Guardsman matter.

The Court: That is a Quarter Sessions matter.

Mr. Langbein: And the other——

The Court: Is the Johnson matter?

Mr. Langbein: I will have to ask your Honor to bear with me a moment while I identify this.

The Court: Certainly.

Mr. Langbein: The other is an assault and battery matter. Now, may I speak at side bar, please?

[fol. 17] The Court: You may.

(Colloquy at side bar with Mr. Sommer and the Court.)

(Proceedings resumed within hearing of the jury.)

Mr. Sommer: In so far as the first of these two is concerned, I object to its admission on the ground that on the face of it he was not convicted of a crime within contemplation of the statute. In so far as the second one is concerned, I object to its admission because on the face of it it shows that he was not convicted and did not plead guilty to the charge.

The Court: By the first and second I understand, Mr. Sommer, you are referring to——

Mr. Sommer: The assault and battery case and the breaking and entering case.

Mr. Langbein: If the Court please, as to the first, the assault and battery, it appears from the face of the record that the charge is of beating, wounding and ill treating a certain named person which, it seems to me, is obviously a violent thing to do. You don't beat, wound and ill treat quietly. As to the second, a plea was entered, a plea of non vult which is, in contemplation of law, equivalent to a plea of guilty, and a judgment thereon, is, in contemplation of law, a judgment of conviction.

The Court: May I see the certified copy. The Court has examined the certified copies and has removed that dealing with the December 18, 1934 case. Same forms, no part of this case, is not covered by the indictment and cannot be received in the matter. Certified copies offered deal with the [fol. 18] assault and battery, and the breaking and entering more particularly set forth in the indictment returned by

the Grand Jury, and both show a conviction and they are received and will be marked.

Mr. Sommer: I pray an exception.

(Exception allowed and sealed.)

Forman, [L. S.] U. S. D. J.

(Received and marked Exhibit G-5.)

Mr. Langbein: If the Court please, may I ask that this be noted as taking place at side bar. May I ask to have the extra one marked for identification? I may need it.

The Court: Yes, you may make the offer.

Mr. Langbein: I wanted the record to show that these papers, dealing with carrying a pistol charge, are the papers which the Court has detached from the certification, and I will ask to have them marked G-6 for identification. I am not offering them.

(Marked Exhibit G-6 for identification.)

Mr. Langbein: That is the Government's case, your Honor. Government rests.

Mr. Sommer: I ask that the jury be excluded for the purpose of a motion.

The Court: Yes. Ladies and gentlemen of the jury, you may retire to the jury room. Yes, Mr. Sommer.

Motion to Suppress Evidence

Mr. Sommer: I first move to suppress the evidence which was the result of the search in this matter upon the follow-
[fol. 19] ing grounds: The agent that was on the stand has admitted that he, together with three other agents, went to the premises in question with two thoughts in mind and with the determination to do two things, arrest the defendant Frank Tot and search his home. They had a warrant for his arrest but did not have a search warrant. Two of the agents remained in the front of the house and two went to the rear. The two that went to the rear of the house knocked on the door and were admitted by the defendant Tot into the kitchen. They asked him who he was. He told them. They told him that they had a warrant for him and they placed him under arrest. That took place in the kitchen and there could be no doubt from the witness' testimony that at the place where he was placed under arrest, even in that room, there was no revolver. But subsequently,

going into another part of the house where they had no right to go going into a bedroom, a considerable period of time subsequent to the arrest, because he testified that he went to the front of the house and let the other agents in and then came through the house, there was, according to his statement, a conversation with the defendant Tot, that he had a gun, that the gun was in a pocket of a coat which was in a wardrobe which wardrobe was closed; he offered to get it for them, and of course they very sensibly refused his assistance and found the gun. Now, if the gun had been on his person or if it had been very close at hand in the room where he was placed under arrest, then there would be no question but that they would have a right to seize the same; but it was neither in his possession nor was it in the room where he was arrested. This question was very clearly decided [fol. 20] by the United States Supreme Court in the case of Lefkowitz against United States, 285 U. S. 452. In that case agents or officers of the Government armed with a warrant went to the place of business of Lefkowitz, announced the fact that they had a warrant for his arrest, placed him under arrest and then proceeded to search the adjacent room to the room in which they placed him under arrest; and the Supreme Court there said that searches for evidence in places or rooms other than the room in which a person is arrested are exploratory searches and cannot be made where there is a warrant for the person's arrest, and that person has been placed under arrest. And in the Lefkowitz case the Supreme Court suppressed the evidence.

Now, there is an opinion in this case by Judge Forman. There, if your Honor will examine it, your Honor will find that immediately upon the defendant being arrested according to the finding of fact, he was asked whether he had a revolver and it was found to be hanging in a coat nearby which would, from a reading of it at least, indicate that the coat was in the same room in which he was arrested and the revolver was readily available to him. Under the testimony here we have a totally different situation. I could cite to your Honor dozens of cases that I think are clearly in point, but I think the Lefkowitz case is entirely dispositive of the matter as is the case of Gobart Company *vs.* United States in 282 U. S. 344.

Now, of course your Honor's ruling upon this motion, or depending upon your Honor's ruling upon this motion would depend whether or not a motion for a directed verdict

[fol. 21] should be made because a motion for a directed verdict would be based upon totally different grounds and would be dependent first upon whether or not the revolver was permitted to remain in evidence. So may I withhold that awaiting your Honor's decision on this argument?

The Court: You may.

Mr. Langbein: If the Court please, on the question of illegal search and seizure, it seems to me that the basic rule on search and seizure is, as Mr. Sommer, I believe, has suggested, that you cannot go search for evidence. Your search and seizure has to be incidental to something else, even when you go in with a search warrant, and the question is what was this incidental to. Here the agents went in to search the house, but of course not to search for a gun, as they testified, and as the search warrant itself shows. The search warrant is in evidence.

Mr. Sommer: That is no search warrant.

Mr. Langbein: Oh, I beg your pardon. They went in to search the house, but, they went in to search the house on another charge, and it is perfectly clear from the face of the arrest warrant what the purpose of that search was. The arrest warrant recites that there is an allegation that the defendant Tot aided and abetted in the theft of some merchandise. Obviously they were looking for some merchandise. The gun when found was found in the course of something else preparing the defendant to get dressed, go up to the U. S. Commissioner's office and be arraigned. The finding of the gun took place in the course of ordinary police precaution in the custory of a prisoner. Finding [fol. 22] a gun under those circumstances on the prisoner's own invitation, it seems to me, is not at all like the usual search for evidence that is condemned in Gobart, Lefkowitz and half a dozen other cases. For that reason I believe that the finding of the gun took place in a perfectly proper manner and that the evidence of the finding of the gun should not be suppressed.

Mr. Sommer: Might I say this, your Honor, just in answer to Mr. Langbein; there are a number of decisions, one Amos *vs.* United States in 255 U. S. 313 and Doops *vs.* United States, 275 U. S. 142 and those cases hold, together with the Herda case, 27 Fed. (2nd) 521, that the defendant did not object to the search of the premises and in assent aided the officers in their search by telling them where they could find that for which they inquired, was not a waiver

of his constitutional rights because peaceful submission after a display of authority by officers cannot be construed as a waiver of such rights.

The Court: Mr. Sommer, in the Gobart case what did they find and what did the Supreme Court suppress?

Mr. Sommer: In the Gobert case my present recollection is rather vague as to what they found. In the Lefkowitz case they found a lot of papers.

The Court: Had they been taken at the time of the crime?

Mr. Sommer: No.

The Court: They were connected with the crime; they weren't the proofs of the crime, were they?

Mr. Sommer: They were evidence to help prove an offense.

[fol. 23] The Court: Now, in the case reported in 255, 313 what was seized?

Mr. Sommer: I don't recall what, I don't recall what was seized in those cases. I believe that they were liquor cases, but what actually happened in those cases was this: The officers came to the house and displayed badges and said that they desired to search the premises, and the owner of the premises there in charge, talking to them, said, "Well, gentlemen, as long as you are here and you have a badge showing that you are an officer, I am perfectly willing to take you through the place and you may search it." But the Court there said that kind of submission to the search of a home is not a waiver of the constitutional rights which require the possession of a search warrant to search a home; and a warrant for arrest cannot be used for the purpose of going under those restrictions set up by the 4th and 5th Amendments to the Constitution.

Mr. Langbein: May I answer that briefly, your Honor?

The Court: Yes.

Mr. Langbein: It has never yet been decided whether the Amos case which, of course, is the leading case on this question of submission and consent and acquiescence turns or does not turn on the fact that it was a home. The treatment of the case, as you can see, if you scrutinize the language in the lower court, indicates that the case turned on the fact that the particular person who may have acquiesced there was a woman. However, we don't put this case alone on acquiescence, we put it on the theory, as I stated when I argued the matter for the first time here, on the acquiescence [fol. 24] as being a mere incident of a police precaution that

would ordinarily be taken when you were getting a man his clothes to dress him to take him down to be arraigned.

The Court: The evidence before the Court indicates that the seizure was made at the time of arrest. It was made at the place where the arrest was made, namely 182 E. Kinney Street, Newark, N. J., in which premises, and more particularly the 2nd floor thereof—and it was on the 2nd floor that the arrest was made—the defendant Frank Tot lived. The seizure can be distinguished from the cases cited by counsel for the defendant in that the revolver, the bullets and the magazine marked in evidence and identified as Exhibits 2, 3 and 4 for the Government, are things which could be used to effect an escape from custody, and there an exception, in the opinion of this Court, to the rule enunciated by counsel for the defendant and relied upon by him.

Mr. Sommer: I pray an exception to your Honor's ruling.

(Exception allowed and sealed.)

Forman, (L. S.) U. S. D. J.

MOTION FOR A DIRECTED VERDICT

Mr. Sommer: Now, at this time I move for a directed verdict on the ground that the Act under which this charge is laid and the particular section under which it is brought reads as follows: "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice, to receive any firearm or ammunition which has been shipped or transported in interstate or foreign [fol. 25] commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter."

There is no proof that this firearm was ever anywheres but in the State of New Jersey and through a presumption may exist under the statute that it was received, the Government must first prove that the gun was some place other than in the State of New Jersey.

The Court: Have you finished, Mr. Sommer?

Mr. Sommer: On that particular point.

The Court: The Court overrules you on that.

Mr. Sommer: I pray an exception.

(Exception allowed and sealed.)

Forman, (L. S.) U. S. D. J.

Mr. Sommer: The term firearm, as defined in the Act is defined as follows: "The term 'firearms' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action or an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon."

The words of the statute are clear. There are no commas present, but it says a weapon and a firearm silencer or muffler or any part or parts of such a combination. There is no proof before this Court that the revolver in evidence ever had a silencer annexed to it or that it would be possible to annex one to it. In view of the failure to show [fol. 26] that, then it cannot be a part or parts of the combination which the statute requires.

Now, on the question of construction of the statute and its meaning, let me say this to your Honor: The Act is written in clear, plain English, and does not seem to be the least bit ambiguous. From a mere reading of it, it says, using different wording, a "firearm" is a gun or a rifle or a revolver or a pistol and a firearm muffler or firearm silencer or any part or parts of such a combination. The word "and" is clearly used in the conjunctive and not in the disjunctive. Using it that way the Act refers to guns with silencers attached to them or parts of the combination and does not apply to guns for which there are no silencers or mufflers and which could not be a part of such a combination. It makes the muffler or silencer an integral and indispensable part of the firearm.

Now, this statute is a penal statute and the penal law is intended to regulate the conduct of people of all grades of intelligence within the scope of responsibility. It is therefore essential to justice and humanity that it be expressed in language which all can easily comprehend; that it be held obligatory only in the sense in which all can and will understand it. And this consideration presses with increasing weight according to the severity of the penalty. Hence every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation: and every provision intended for the benefit of the accused for the same human reason, received the most favorable construction.

[fol. 27] Now, that law has been the fundamental law of this land practically since the inception of our method of jurisprudence.

The rule that penal laws are to be construed strictly is perhaps not much less old than the constitution itself. It is founded on the tenderness of the law for the rights of individuals and on the plain principle that the power of punishment is vested in Congress or the state legislature and not in the judicial department. It is the legislature or Congress, not the court, which is to define a crime, ordain its punishment and prescribe the procedure to be followed in the case.

Intent is the vital part, the very essence of the law. This is the intention embodied and expressed in the statute. A legislative intention to be efficient as a law must be set forth in a statute, it is therefore a written law.

That has been the holding of the United States Supreme Court in U. S. *vs.* Goldenberg in 168 U. S., page 95 and Wabash Railroad Company *vs.* U. S. in 178 Fed. page 5.

How the intention is to be ascertained is only answered by the principles and rules of exposition. If a statute is plain, certain and unambiguous so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless.

That was held in the case of Ruggles *v.* Illinois, 108 U. S. 526, and also in this state in the case of Water Commissioners *v.* Brewster, 42 N. J. Law 125.

The sole authority of Congress to make laws is the foundation of the principle that Courts of Justice are bound to [fol. 28] give effect to its intention. When that is plain and palpable they must follow its implicitly. The rules of construction, with which the books abound apply only where the words used are of doubtful import.

When there is no ambiguity in the words there is no room for construction. The case must be a very strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest.

Even if a statute were ambiguous, the construction adopted should be that most favorable to the accused.

Referring now to the statute under consideration the words are plain, clear and definite and the only conclusion that can be reached is that it was the intention of Congress to regulate the transportation in interstate commerce of guns to which silencers could be affixed and silencers or mufflers and a combination of the two things and Congress did not intend to regulate against the transportation of all pistols and revolvers.

Now, your Honor will find that in 1934 Congress passed what was known as the Federal or the National Firearms Act. That statute differs completely from the Federal Firearms Act of 1938 which is the Act under which this case is brought. Your Honor will find in the book a number of decisions covering the question of the 1934 Act but that Act and this are completely different and apart. That Act applied to sawed-off shotguns and things of that class which [fol. 29] were considered weapons which were not known to the military sense; that is to say, that they were not known in the militia or in the army though possibly today there may be the use of some of those implements. It was intended to cover those that were known as gangster armaments. This statute was subsequently passed and I think that the reading of it clearly shows that it was not intended to cover every revolver that existed but, as it says, those that could be combined with a silencer or muffler. The term "silencer or muffler" mean exactly the same thing, both being a device attached to the end of a gun for the purpose of lessening the sound by allowing the gases to expel slowly; and in view of the fact that the Act is in the conjunctive, in view of the fact that there is no proof that it would be even possible to annex a silencer to this revolver, I respectfully move for a directed verdict of not guilty.

* * * * * * *

The Court: I think the matter can be decided at this time. Mr. Sommer, as I understand your argument, you say you have a weapon made up of two parts, that which is the revolver, shall we say, and to which revolver can be attached a silencer, and together they form a unit which is identified as the weapon, under the wording of the statute. That argument might have considerable merit if the statute did not continue with the words "or any part or parts of such weapon," which indicates to this court that the unit can be broken down and its two component parts can each be the subject of the statute, the revolver, which is a part, or the [fol. 30] muffler or silencer which is a part. You might say that the words "or any part or parts of such weapon" means the magazine for example; means the trigger; means the muzzle or the handle, but I don't believe the statute can be restricted to mean one or more, but less than all of the component parts, unassembled and shipped, shall we say, one or several, but less than all at a time.

I am of the opinion that the words, "or any part or parts of such weapon" means one or more and perhaps all, shipped one at a time or all at a time, shipped unassembled or assembled, and so the motion is denied.

Mr. Sommer: Might I just say this, your Honor? Your Honor has stated exactly what my contention is and your Honor apparently agrees with me very definitely by your statement, because it is my contention that the statute says a revolver and a silencer or any part or parts of that combination. Now, your Honor has just stated that that is your opinion and I agree with it, but the point that your Honor seems to have overlooked is that it is my contention that there is no proof before your Honor that it would be possible to attach to this weapon a silencer; and with the lack of proof that it would be possible to annex a silencer to this weapon it cannot be a part of that combination. That is my argument and I agree with your Honor on your construction of the statute, that it means a combination or any part or parts of that combination. But there is no proof that this could possibly be a part of the combination.

The Court: Mr. Sommer, what I said was that even assuming your argument, it is answered by the statute as I [fol. 31] interpret the statute. With respect to the argument that the revolver which has been received and is G-2 in evidence, that same can not have attached thereto a silencer or a muffler and that therefore it cannot be a part of the weapon referred to in the statute, nor can it be the weapon referred to in the statute—I am going to give that further thought. I don't think I can answer it without some additional thought.

Mr. Sommer: I might say at this time, if your Honor please, that I am definitely prepared to prove that this revolver could not be a part of such a combination.

. . . . . .

Mr. Langbein: I haven't yet made a motion, your Honor. We are still at the discussion stage and my suggestion is this, that if your Honor feels that decision of the case should turn on the part or parts clause, then I will make such a motion to meet the proof which I know that Mr. Sommer can adduce on it; that if the decision is not to turn on the part or parts clause but is to turn on the generalities to which I adverted in my main argument, those additional facts on both sides of the case are unnecessary

and it will therefore be unncessary for me to make any such motion.

The Court: That would be — ask made for the purpose of offering proof on a question which is one of law and need not be received before this case is submitted to the jury, and so the suggestion at the beginning, that is just before the trial started, that we continue and submit the fact question, if there is one, to the jury, which verdict [fol. 32] could be set aside in the event that the Court finds that the statute has not been met, seems the best way to proceed, unless I can arrive at a conclusion during the luncheon. We will send for the jury.

. . . . . .

(Afternoon Session)

(Mr. Sommer opened on behalf of the defendant.)

Frank Tot, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Sommer:

Q. Mr. Tot, in 1925 were you convicted of assault and battery?
A. Yes, sir.
Q And were you sentenced for that offense?
A. Yes.
Q. And did you serve your time?
A. Yes, sir.
Q. And in 1932 were you convicted of breaking and entering?
A. Yes, sir.
Q. You pleaded guilty to that charge or non vult, didn't you?
A. Non vult.
Q. And were you sentenced for that offense?
A. Yes.
Q. And did you serve your time on that sentence?
A. I got probation for it.

Q. Now, since 1932, have you been convicted of any offenses?

A. Liquor offense.

Q. Other than that have you been convicted of anything since 1932?

A. No.

The Court: What did you say, sir?

The Witness: A liquor offense.

Q. Where were you living in September 1938?

A. 182 E. Kinney Street.

[fol. 33] Q. And with whom did you live at that address?

A. My wife.

Q. And how long have you lived there?

A. Since our marriage.

Q. And when was that?

A. About—I am married about six years. It must be about '35.

Q. And prior to that where had you lived?

A. My mother's house.

Q. Where is that located?

A. Warwick Street.

Q. Newark, New Jersey?

A. Yes.

Q. And how long had you lived on Warwick Street prior to your marriage?

A. About fourteen or fifteen years.

Q. Now, on September 22, 1938 at about 7 o'clock in the morning where were you?

A. I was at the kitchen sink washing myself.

Q. And what happened?

A. Well, a couple of men sneaked up the porch by the back door and I had a little pup, and this here pup went to the door and door opens up by itself, it is so easy, it is unlocked. Of course my wife had went to work. She went to work before I did. Well, when I seen the shadow on the frosted glass on the door, I seen the shadow, I seen a man there, I says, "Come right in, the door is open," and Mr. Dickstein and this agent here showed me a warrant for my arrest.

Q. Now, I show you Exhibit G-1 and ask you if this is the warrant they exhibited to you?

A. I don't recall now.

Q. But they did show you a warrant?

Mr. Langbein: I didn't get the witness's answer.

Mr. Sommer: He said, "I don't recall whether that is the one."

Q. But they did show you a warrant for your arrest, is that correct?

A. Yes.

[fol. 34] Q. And did they give you the warrant to read?

A. Mr. Dickstein gave it to me.

Q. And did it charge you with aiding and abetting in the theft of merchandise in the form of Camel cigarettes?

A. Yes.

Q. Where did you go to read the warrant?

A. I sat at the kitchen table.

Q. Who remained in the kitchen with you?

A. This gentleman here and another fellow. There was four of them there.

Q. And while you were in the kitchen did you have a conversation with any of the agents?

A. Mr. Dickstein and this gentleman asked me if I had a revolver, a gun.

Q. What did you tell them?

A. I said, "Yes, in the bedroom, in the wardrobe, in one of my suits."

Q. And then what was done?

A. When I went to get up from the table two of the agents had guns in their pockets and they put it to me and I couldn't run into that bedroom.

Q. Now, who went in the bedroom?

A. Two of them, two of them went in there while two watched me.

Q. And how were you dressed at that time?

A. I had overalls on and in my undershirt.

Q. And did you get a suit to put on afterwards?

A. They asked me what suit I wanted out of the wardrobe and I told them a blue suit and they took it out and they threw it at me.

Q. Where were you when they threw it at you?

A. Between the kitchen and the bedroom door.

Q. Now, I show you Exhibit G-2, a revolver, and ask you to whom that revolver belongs. Look at it, to whom does it belong?

A. To me.

Q. And how long before September 22, 1938 did you have that gun in your possession?

A. I have had that a year before I was married, about a year.

[fol. 35] Q. And where did you get it?

A. Well, I got it off of one of the unfortunates that's around the dump.

Q. And that would be back around 1934 that you got it?

A. Something like that.

Q. From 1934 up until September 1938 was that gun always in your possession?

A. Yes.

Q. What kind of a neighborhood do you live in?

A. Well, a bad neighborhood, very bad.

Q. What do you mean by that?

A. Well, it is a colored section and there has been a lot of occurrences around there that isn't safe.

Q. And why did you keep this revolver in your home?

A. For protection.

Q. Now, on this charge that you were arrested on by these agents, have you ever been prosecuted for the offense mentioned in the warrant?

Mr. Langbein: I object, whether or not this man has been prosecuted is irrelevant.

The Court: How is that material?

Mr. Sommer: Only that the warrant is in evidence charging him with an offense and I think he has a right to show that he has never been indicted, tried or convicted on such an offense.

Mr. Langbein: If the Court please, that gets us off to collateral matters and it would then be up to us——

The Court: I don't see the materiality of it. I will sustain the objection.

Mr. Sommer: I pray an exception.

(Exception allowed and sealed.)

Forman, U. S. D. J. [L. S.]

Q. That's all.

[fol. 36] Cross-examination.

By Mr. Langbein:

Q. Mr. Tot, I believe you mentioned three convictions of crime on your direct examination, the assault and bat-

tery, the breaking and entering and a liquor charge, right?

A. Yes.

Q. Where was the liquor charge?

A. Flemington, New Jersey.

Q. No other liquor charges?

A. No.

Q. And that is charges in the state, in this state?

A. Yes, sir.

Q. Where you ever convicted of a crime out of this state?

A. As far as—I don't remember.

Q. You don't remember. Ever been in Massachusetts?

A. Yes.

Q. Any liquor conviction there?

A. I wasn't convicted.

Q. Oh, I see. You are sure of that now?

A. Well, I am quite certain. Do you want me to answer that in my own way?

Q. Yes, if you want to.

A. All right. Well, when I was wanted for the charge over here at Newark and I was up there, the Judge told me that he would throw that case out providing I would go back to Newark without extradition papers and I told him I was willing to come back to Newark and he threw that out.

Q. I see. Sort of a deal with the Judge?

A. Well, he told me if I go back to Newark without having extradition papers, he would throw that case out.

Q. When was that?

A. Nineteen—around 1930 or something, 1929 or '30, something like that.

Q. And will you jog your memory and see if you can tell us whether there are any other convictions in the state courts here in New Jersey?

A. Well, maybe you could remind me of some. I don't remember of any.

Q. Were you convicted in the state courts of New Jer- [fol. 37] sey of carrying concealed weapons, ever?

A. Why, I admitted that before.

Q. Oh, I see. This is carrying concealed weapons which you admitted?

A. That was admitted before conviction and tried and I was sentenced for it. That is the charge that I pleaded guilty to.

Q. Oh, well, let's get this straight. We have this conviction that we are talking about now carrying concealed weapons and you say you pleaded non vult to it?

A. That's right.

Q. Are you quite sure that you weren't tried on that?

A. On what?

Q. On this same charge that we are talking about.

A. What charge is that?

Q. The charge is carrying concealed weapons and convicted on it after a verdict of guilty.

A. What charge is that?

Q. The charge is carrying concealed weapons. I am sorry to have to keep you straight on all this, but——

A. When was that?

Q. I am referring to a charge of carrying a concealed weapon and on which you were found guilty after a trial and a verdict of guilty on June 22, 1925, is that right?

A. No, sir.

Q. That is not?

A. No, sir. I did not have a trial.

Q. You did not have a trial?

A. A jury trial if you mean that, I did not. I pleaded non vult for a Judge.

Q. And then if the official records of that court should show that you were tried by a Judge after a waiver of a trial by a petit jury, and that your application for trial by a Judge was granted, and that the Judge handed down a verdict of guilty after trial was moved, then the records of the court, if they so show, are in error?

A. Well, there was a party—he is not here now—the man [fol. 38] that defended me, and he was at the trial.

Q. But at any rate, whether you are right or the records of the court are right, you were convicted on that charge of carrying a concealed weapon in 1925?

A. On circumstantial evidence.

Q. Oh, I thought you pleaded guilty.

A. Yes, because I was a young boy at the time.

Q. I thought you were worried about the circumstantial evidence.

A. After I found out later on in years, I knew what it was, all right, it was too late.

Q. Well, let's get this straight now. Here is this one that you say you pleaded to and the records say that you

were convicted on, and then we have the assault and battery, and that is the one that you were convicted on and were sentenced on, right?

A. That's right.

Q. And then after that we have the breaking and entering?

A. Yes, sir.

Q. On which you took a plea and were put on probation?

A. Yes, sir.

Q. And then besides that we have the liquor charge down at Flemington; is that right?

A. That's right.

Q. And those are your only convictions, just those four: the Massachusetts affair was a deal?

A. Well, I wouldn't say it was a deal. I don't think you would call that a deal.

Q. But at least the Massachusetts affair was not a conviction?

A. No.

Q. How old are you, Mr. Tot?

A. 37.

Q. How ich education have you had?

A. 6th grade Grammar School.

Q. What do you do for a living?

A. I am a longshoreman.

Q. How long have you been a longshoreman?

A. Well, I have been since I am married. Previous to that too, a few months previous before I was married.

[fol. 39] Q. Were you a longshoreman at the time you got this gun?

A. I don't remember. I must have had it before I was a longshoreman.

Q. What is the name of this man you refer to as the unfortunate around the dumps?

A. Well, there is a lot of them around the dumps and you don't ask names down there.

Q. About when was it that you say you got this gun?

A. About '33 or '34, something like that.

Q. And this was an unfortunate?

A. That's right.

Q. What did you pay for the gun?

A. I gave the man a bottle of alcohol for it.

Q. Did you know whether that gun was stolen?

A. No, sir, I do not.

Q. Do you know whether that gun was used in a crime before you got it?

A. No, sir.

Q. Did you ever see the man since, this unfortunate?

A. If you go down there you would never see the same man twice. They move in and out. They go all over the country, I guess. You don't know where they go.

Q. Well, I take it your answer is that you never did see him?

A. No, I never did see the man again.

Q. That is all.

Mr. Sommer: At this time I would like to offer in evidence a letter from the Colt Patent Firearms Manufacturing Company.

Mr. Langbein: Is this put in evidence before the jury or in evidence for the purpose of identification for his Honor on a motion.

Mr. Sommer: Well, whether the Court will permit it to go to the jury is another question. I think it has to do with a question of law that the Court will have to decide.

The Court: Is there any objection?

[fol. 40] Mr. Langbein: I would just like to get the purpose of the offer straight.

The Court: If I understand the purpose of the offer, it is directed to a question of law.

Mr. Langbein: And it will not be put in, a completely irrelevant document which will have the function of confusing the jury.

The Court: Let me see it, gentlemen.

Mr. Langbein: I want to make my position clear, your Honor that it is a matter which will merely confuse the jury by injecting a new issue into the case.

The Court: This deals with the question of law and will not be given to the jury, it will be received for purposes of the Court.

Mr. Langbein: I have no objection.

(Received and marked Exhibit D-1.)

IRENE TOT, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Sommer:

Q. Mrs. Tot, you are the wife of the defendant in this case?

A. Yes, sir.

Q. And you live where?

A. 182 E. Kinney Street.

Q. And how long have you lived there?

A. Five years.

Q. And how long have you been married to the defendant?

A. Six years next month.

Q. Now, I show you Government Exhibit G-2, a revolver, and ask you whether you have ever seen that revolver before?

A. Yes.

Q. And where have you see- it?

A. In the wardrobe in my home.

[fol. 41] Q. And how long has the revolver, Exhibit G-2, how long was it in your home prior to September 22, 1938?

A. Always.

Q. Ever since you lived in the house?

A. Yes.

Q. That is all.

Cross-examination.

By Mr. Langbein:

Q. Have you ever been convicted of a crime, Mrs. Tot?

A. Yes.

Q. You have; what crime?

A. I don't remember now.

Q. You don't remember what crime it was you were convicted of?

A. No.

Q. Mrs. Tot, what is the serial number of this gun, do you know?

A. I wouldn't know. I never touched it.

Q. You never touched it. You are not an expert on guns?

A. No.

Q. Do you know what the brand of this gun is?

A. No, only from what I have heard today. I heard you mention Colt.

Q. Are you able to tell us definitely and certainly the way you appeared to tell us on direct examination, Mrs. Tot, that it was this gun that your husband had rather than some gun of the same make and calibre, general appearance or what not?

A. Well, I cannot tell you definitely, but it was one like it.

Q. It was one like it. It might have been some other gun?

A. Well, I don't know guns, one from the other.

Q. I see. All you are able to tell us is that your husband Frank Tot had a gun?

A. Yes, sir.

Q. How many times have you seen this gun, assuming it is the same gun, of course.

A. Well, I haven't really looked at it because I never bothered to look at those things. It was always in the wardrobe. That was all.

[fol. 42] Q. Well now, didn't you run across that gun if it was always in the wardrobe?

A. Well, I have nothing to do with my husband's suits; he takes care of his own.

Q. I see. The times when you saw it, it was in the wardrobe, is that it?

A. I have seen it now.

Q. Well, aside from now?

A. Well, I seen it once before when Frank changed it from the suit.

Q. When he changed it from one suit to another?

A. Yes, when he sent it to the tailor.

Q. And when you saw it it was always in a suit then, is that it?

A. Well, it was always in that one suit except the time he changed it once to send it to the cleaner.

Q. And you are unable to tell us even roughly, I take it, how many times all told you saw the gun?

A. No.

Q. That you think was this gun; and you are still unable to remember what crime it was of which you were convicted?

A. No.

Q. That's all.

Re-direct examination.

By Mr. Sommer:

Q. Just one question. The gun that was in the wardrobe on the morning of September 22, 1938 was the same gun that had been there right along, was it not?

A. Yes.

Q. That is all.

Recross-examination.

By Mr. Langbein:

Q. Just a moment. How do you know it was the same gun?

A. Because Frank had never used it.

Q. How do you know that he didn't swap guns, put another one in there?

A. Well, I was always home. He never done it while I was there.

Q. Your answer really is, so far as you know it is the same gun, isn't that it, but you don't really know?

A. Well, I am quite sure.

[fol. 43] Q. Well, now, you have just told us that; you didn't spend your life watching that gun?

A. No.

Q. You don't know whether it is the same gun. You just think so, isn't that right?

A. Maybe.

Q. That is all.

Jennie Tot, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Sommer:

Q. Miss Tot, you are a sister of the defendant?

A. Yes, sir.

Q. And you reside where?

A. 43 Warwick Street.

Q. Newark?

A Newark.

Q. And prior to your brother's marriage where did he live?

A. With us, 43 Warwick Street.

Q. And when was he married?

A. He was married six years ago.

Q. And after his marriage, where did he go to live?

A. 182 Kinney Street.

Q. You visited him there?

A. Quite often.

Q. And I show you Exhibit G-2, a revolver, and ask you whether you have ever seen this revolver before?

A. Yes, I did.

Q. Where did you see it?

A. In the wardrobe at home.

Q. On Warwick Street?

A. 43 Warwick Street.

Q. And did your brother keep it in his wardrobe at home prior to his marriage?

A. All the time.

Q. That is all.

Mr. Langbein: May I have the last question and answer, please?

(Last question and answer repeated by the reporter.)

[fol. 44] Cross-examination.

By Mr. Langbein:

Q. As I understand you, you have seen this gun both at the home where he lived before his marriage and at his home?

A. That's correct.

Q. Where he has lived since his marriage?

A. That's right.

Q. Kept in the wardrobe or in a wardrobe in both places?

A. Yes.

Q. Now, you heard Mrs. Tot testify that the gun was kept generally in a suit?

A. That's right.

Q. At the home where he lived after he was married, in the wardrobe?

A. That's right.

Q. Are you able to tell us where it was kept or how it was kept in the home where he lived before?

A. In both homes or just the one home?

Q. No, in the other home.

A. In his marriage home?

Q. Well, all right. First tell us does that accord with your own recollection that that was where he kept the gun after he was married?

A. Yes.

Q. Now, before he was married you say he kept the gun in the wardrobe but he also kept it in a suit?

A. Not in a suit, in a drawer.

Q. It was just after he was married that he took to keeping it in his suits, is that so?

A. I suppose so

Q. As far as you know?

A. Yes.

Q. Are you a gun expert?

A. Oh, I should say not.

Q. Then I take it you don't know either whether this is really the same gun that you say you saw?

A. Well, it reminded me of a water pistol; that is why I know it.

Q. I take it——

A. I don't mean I know it, but the name on it.

Q. The name Colt?

A. That's right.

Q. You know your brother had a Colt gun, is that it?

A. That's right.

[fol. 45] Q. Do you know how many guns he had all around?

A. How many guns?

Q. Yes.

A. I couldn't tell you. I saw only but one.

Q. Only one at a time?

A. One at a time. He wouldn't dare to bring it home if he had any, I mean.

Q. Then, what you know is that your brother used to have a Colt gun that looked like a water pistol?

A. One of those things just like you have in your hand.

Q. Did you live at Warwick Street too?

A. I still do.

Q. You still do; you and your brother lived there together, I take it?

A. Of course.

Q. Family home?
A. That's right.
Q. Did you see your brother buy this gun?
A. No.
Q. How often did you used to see this gun when it was at Warwick Street?
A. Every week I did the washing and ironing, I used to put his clothes in his drawer. I still do the washing and ironing.
Q. You would see the gun in the drawer?
A. That's right.
Q. Or to be more precise, you would see a gun in the drawer, right?
A. Of course, a gun.
Q. That you. That is all.

Mr. Sommer: That is all.
The Court: You may step down.
The Witness: A gun.
Mr. Sommer: That is all.
The Court: You may step down.
Mr. Sommer: We rest.
Mr. Langbein: One piece of rebuttal testimony, the representative of Colt Patent Arms Company.

[fol. 46] Robert E. Courtney, called and sworn in rebuttal on behalf of the Government, testified as follows:

Direct examination.
By Mr. Langbein:

Q. What is your occupation, Mr. Courtney?
A. I am employed by the Colt Patent Firearms Manufacturing Company, Hartford, Connecticut.
Q. I have subpoenaed you to produce the shipping record for a Colt automatic serial number 310977?
A. That's right.
Q. Do you have custody of shipping records?
A. Yes, they are made under my supervision and kept in my department entirely.
Q. How long have you worked for Colt?
A. 36 years.
Q. I asked you to produce the shipping record for gun number 310977. Do you have it?
A. Yes.

Q. It is in a volume rather than a separate record?

A. Yes, complete shipment made to——

Q. Well, just tell us from your records what the name of the issuee of that gun was when the gun was shipped?

A. Hibbard, Spencer, Bartlett & Company.

Q. And do you know where Hibbard, Spencer, Bartlett & Company is?

A. I do.

Q. Where is it?

A. Chicago, Illinois.

Q. And does your record show the date of the shipment?

A. Yes.

Q. When was it shipped?

A. September 23, 1919.

Q. I show you Government's Exhibit G-2, a gun, and ask you to examine it and see whether it corresponds with your record of shipment?

A. It does.

Q. Thank you.

[fol. 47] Cross examination.

By Mr. Sommer:

Q. Your record wouldn't show when it was shipped to the State of New Jersey, would it?

A. Oh, no.

Q. But it was shipped from your plant in 1919?

A. That's right.

Q. That is all.

Mr. Langbein: That completes our case on rebuttal, your Honor. The witness may step down.

The Court: Anything further, gentlemen? Both sides rest. How much time do you require?

Mr. Sommer: I have a motion that I would like to make.

The Court: The jury may retire.

(The jury retired.)

MOTION FOR A DIRECTED VERDICT

Mr. Sommer: I would now like to move for a directed verdict of not guilty and a dismissal of the indictment upon two grounds: First, upon the same grounds that I urged for a directed verdict or a dismissal of the indictment at the end of the Government's case, and I would like to have the Court consider my remarks then as being stated now without re-

peating them. And on the second ground which is as follows: There is no evidence or testimony before your Honor that this gun was shipped in interstate commerce subsequent to the enactment of this act of June 30, 1938. There is testimony before your Honor that it was shipped in interstate commerce in 1919 and lawfully so shipped. The Act says that the possession of a gun by a person who has been [fol. 48] convicted of crimes of violence shall be presumptive evidence that it has been shipped, transported or received in interstate commerce, as the case may be; that is merely a presumption. What the case may be has not been shown by the evidence and the indictment charges shipped and transported.

Now, a presumption is never evidence and a presumption ceases to be valid when evidence tending to show the actual facts is brought forth. That was decided in the case of Normandin *vs.* Parenteau, 150 Atlantic 460. Another case decided in New Jersey, the case of Robinson *vs.* Robinson in 90 Atlantic 311 held that it is impossible to predicate judicial action upon a presumption which is wholly repelled by the evidence.

Now, here we have a presumption created by statute in a criminal case which presumption is rebutted by direct testimony to the effect that this gun was in the State of New Jersey long prior to the enactment of the statute. The rebuttal evidence which the Government offered by the witness of the Colt Company only aids that rebuttal testimony. It shows that from 1919 this gun had been out in the public, away from the Colt Company, and I feel, in view of the two decisions that I have cited to your Honor, in view of the fact that there is no evidence whatsoever but a presumption which has been rebutted—credibility or not of witnesses is not to be taken into consideration, because the testimony offered conclusively shows, and not only tends to show as the cases hold, that the presumption is rebutted and the gun was here long prior to the enactment of the statute. [fol. 49] In view of that rebuttal of the presumption, I say there is no question of fact to go to the jury and request that the motion be granted.

The Court: Mr. Sommer, I am going to overrule your motion.

Mr. Sommer: I pray an exception.

(Exception allowed and sealed.)

Forman, U. S. D. J. [L. S.]

* * * * * * *

Mr. Sommer summed up for the defendant.
Mr. Langbein summed up on behalf of the government.

Charge of the Court

Mr. Foreman, and ladies and gentlemen of the jury: The Grand Jurors of the United States, for the District of New Jersey, have returned an indictment which charges the defendant, Frank Tot, with violating sub-section 902 F of Title 15 of the United States Code. This indictment, and I hold it in my hand, is only a step in the proceedings. It is not to be considered by you in determining whether or not he is guilty. It is the method by which the matter is brought before you for your consideration. That is the purpose it serves and it is not evidence in any manner of the offense charged.

This statute was passed and became effective on June the 30th, 1938 and it reads that: "It is unlawful for any person who has been convicted of a crime of violence to receive any firearms or ammunition which has been shipped [fol. 50] or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of the chapter."

There are fundamental rules which will guide you in your deliberations. The defendant is presumed to be innocent. The United States Government must establish his guilt to your satisfaction beyond a reasonable doubt. Reasonable doubt has often been defined, and it might be said that it is very seldom understood. It is not a mere possible doubt, it is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding prediction, to a moral certainty, of the truth of the charge. You must be satisfied of the guilt of the defendant beyond a reasonable doubt, and you arrive at your verdict by considering all of the evidence.

And how does the Government come forward and attempt o establish the guilt beyond a reasonable doubt, and how oes the defendant attempt to meet or meet that which has een offered against him? The United States Government, y the evidence, says that subsequent to June the 30th, 938 Frank Tot received Exhibit G-2, the revolver, after t had been shipped or transported in interstate or foreign ommerce, and it says that is so because this revolver was found in a coat in a wardrobe on the second floor of the house in which Frank Tot lived; that he told the representative of the FBI, the Federal Bureau of Investigation, where the gun was and that, by reason of being so told, one of the investigators for the Federal Bureau went to the wardrobe and there found Exhibit G-2.

Frank Tot comes forward and he says: "have had that gun for many years. I had it before I was married and [fol. 51] when I lived on Warwick Street. After I was married I still continued to have it and I kept it where I lived," that "I acquired it by purchasing it from a man who was on the dumps."

The question is raised and squarely raised: Did Frank Tot have that gun before June the 30th, 1938? If you find that he did your deliberation ends, ladies and gentlemen, and you return to this jury room and render a verdict of not guilty. If you find, however, that he acquired the gun subsequent to June the 30th, 1938, then you have to ask yourselves whether or not that gun was received by him after it had been shipped or transported in interstate or foreign commerce; and you have to be satisfied that it was so shipped or transported beyond a reasonable doubt, before you can find the defendant guilty. But if you find beyond a reasonable doubt that it was so shipped or transported, then your verdict is guilty as charged.

Ordinarily there would be no presumption similar to the one in this case. The burden is on the United States, as I stated, to prove its case beyond a reasonable doubt; that burden does not shift. But by such if there is a presumption that this gun having been found in the possession of the defendant, was transported or shipped in interstate or foreign commerce, if you find that he obtained same subsequent to June the 30th, 1938.

Does the testimony which has been offered on behalf of the defendant, if you find that he acquired the gun subsequent to June the 30th, 1938, meet that presumption and

cause you to have a reasonable doubt as to whether or not the gun was transported or shipped in interstate or foreign commerce? You are, as I have said and if I haven't, I now say, the judges of the facts. You determine what are the facts and you determine the facts by considering all of the evidence and what weight and credibility you will give thereto. That is why these witnesses come before you, so [fol. 52] that you may see them on the witness stand and watch the way they answer questions, know by reason of having seen them, their demeanor on the witness stand. And you have, in passing upon the weight and credibility that you will give to testimony, the right to take into consideration the interest that a person may have in your verdict. And if you believe that a witness knowingly and wilfully testified falsely to any material fact in the case, you may give such weight to his or her testimony on other points as you think it is entitled to; or you may disregard it altogether. False in one thing, false in all, is not mandatory, but rather a permissive inference that the jury may or may not draw when convinced that an attempt has been made to mislead them in some material respect.

There has been testimony of conviction, more particularly the conviction on June the 22nd, 1925 for assault and battery and the conviction for breaking and entering on June the 15th, 1932. They have both been put before you to meet the requirements of the statute that this statute applies to a person who has been convicted of a crime of violence. There is also testimony that Mr. Tot was convicted of another crime other than those two which are set forth in the indictment; and there is testimony that Mrs. Tot was convicted of a crime.

Now, gentlemen, with a respect to those convictions, they are before you not for the purpose of showing that Mr. Tot carried a concealed weapon or that Mrs. Tot was convicted of a crime the nature of which she does not remember, but they are before you so that you can consider what weight you will give to their testimony. They are offered to attack their credibility. In other words, will you believe in whole or in part, the story which has been told by a person who has been convicted of crime? You consider those convictions for the purpose of determining weight and credibility to give to their testimony. That is the purpose.

[fol. 53] This statute is drafted in the manner in which it is in order to meet a situation which would confront one

attempting to prove transportation or shipment in interstate or foreign commerce by creating, as I have said, the presumption of transportation or shipment; and you must determine whether or not that presumption plus the other evidence which has been offered on behalf of the Government is sufficient to establish, beyond a reasonable doubt, that the defendant, subsequent to June the 30th, 1938, received Exhibit G-2, the gun, after it had been transported or shipped in interstate or foreign commerce. That is the question, ladies and gentlemen. If you answer it in the negative, if you say that you are not satisfied beyond a reasonable doubt, or that he had the gun prior to June the 30th, 1938, then your verdict is not guilty. If you are satisfied, then your verdict is guilty as charged.

Are there any exceptions? You may come forward just a minute, gentlemen. Before you take your exceptions, let me look at these requests: The defendant has requested me to charge certain things. Number one has been charged. Number two has been charged. Number three will not be charged. Number four——

Mr. Sommer: Was charged.

The Court: Has been charged. Number five has been charged. Number six has been charged. Number seven has been charged. Number eight has been charged in effect. Number nine has been charged in effect. Number ten will not be charged. Number eleven has been charged. Number twelve will not be charged. Number thirteen is charged in the words of the request as follows: That "it is not a crime in the State of New Jersey for a person to possess a revolver in his home."

I so charge you.

Mr. Sommer: And I wish at this time, if your Honor please, to take exception to your Honor's refusal to charge number 3, number 10 and number 12 of the requests.

[fol. 54] Defendant's counsel prays an exception to the refusal of the Court to charge requests number 3, number 10 and number 12.

(Exception allowed and sealed.)

Forman, U. S. D. J. [L. S.]

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The Court: Gentlemen, will you please check the exhibits and be satisfied that they are in order. There is one exhibit, it is D-1 which is for the benefit of the Court and will be left with the Clerk of the Court. The officer will come forward and be sworn. You may retire, Mr. Foreman, and ladies and gentlemen of the jury.

(The jury retired.)

* * * * * * *

(At 9 P. M. the jury returned to the jury box and returned a verdict of guilty as charged.)

REQUESTS TO CHARGE

1. That a defendant is at all times presumed by the law to be innocent. To convict the government must rebut the presumption of innocence and convince the jury beyond a reasonable doubt that he is guilty.

2. That the presumption of innocence continues in favor of a defendant throughout the entire trial, step by step, and remains with him unless and until the jury have reached a verdict of conviction, on consideration of all the evidence, beyond a reasonable doubt.

[fol. 55] 3. That the jury must infer innocence if possible.

4. That a defendant is legally presumed to be innocent unless and until his guilt is proved beyond a reasonable doubt, after consideration by the jury of all the evidence. The benefit of the reasonable doubt always goes to a defendant and is always applied in his favor on every fact necessary to prove his guilt.

5. That a defendant is entitled to the benefit of the reasonable doubt, on the evidence presented or lack of evidence.

6. That "reasonable doubt" is a term often used, probably well understood, but not easily defined. It is not a mere possible doubt, because everything relating to human affairs and depending on oral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, often the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction

to a moral certainty of the truth of the charge. The evidence must establish the truth of the fact to a reasonable and moral certainty a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it.

7. That the mere fact that an indictment has been returned against a defendant creates no presumption against him. It is a mere step or pleading in the cause. During your deliberations, therefore, you are not to consider the indictment as evidence against any defendant, or permit it standing by itself to in any manner weight against him.

8. That the law does not require of a defendant accused of crime, to prove himself innocent, but the law requires the prosecution to prove the defendant guilty in the manner [fol. 56] and form as charged in the indictment, beyond a reasonable doubt, and unless it has done so, the jury, under their oaths, must acquit.

9. That the statute under which the indictment against this defendant is drawn provides that the possession of a firearm by a person who has been convicted of a crime of violence is presumptive evidence that such firearm was shipped in Interstate Commerce.

10. That such a presumption is never evidence and if you find that this presumption has been repelled by the evidence you must acquit.

11. That unless you can find from the evidence that the firearm was shipped in Interstate Commerce after June 30th, 1938 you must acquit.

12. That unless you can find from the evidence that the revolver which is Exhibit "G-2" was a part of a combination of revolver and silencer or muffler you must acquit.

13. That it is not a crime in the State of New Jersey for a person to possess a revolver in his home.

[fol. 57] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Memorandum. On Petition

UNITED STATES OF AMERICA

vs.

FRANK TOT

JOHN J. QUINN, Esq., U. S. Attorney (by WILLIAM A. SMITH, Esq.), for the Government.

GEORGE R. SOMMER, Esq., Attorney for Defendant.

DECISION—Filed August 14, 1939

FORMAN, *District Judge:*

On June 30, 1938, Congress enacted the Federal Fire Arms Act, which, became, by its terms, effective thirty days after its enactment. Among its provisions is the following:

"(f) It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter." 15 U. S. C. A. 902.

On the morning of September 22, 1938, a Special Agent of the Federal Bureau of Investigation served upon the [fol. 58] defendant, at his apartment at 182 East Kinney Street, Newark, New Jersey, a warrant for his arrest, issued upon a complaint made on September 21, 1938, charging the defendant with stealing from Interstate Commerce. At the time of the arrest, the Agent inquired of the defendant whether he had a gun. Defendant admitted possession of a weapon, and told the Agent it was in the pocket of his coat, hanging near by. The Agent removed a revolver from the coat pocket. Other accompanying Agents contemporaneously searched the apartment. Subsequently, the defendant was taken from the premises and arraigned before a United States Commissioner. There is no dispute as to these facts.

The defendant was indicted on November 15, 1938 in the following language:

"That on or about the 22nd day of September in the year 1938 at the City of Newark in the County of Essex and State and District of New Jersey and within the jurisdiction of this Court, one Frank Tot, otherwise Frank Tott, whose true and correct name, other than as herein stated, is to the Grand Jurors unknown, he, having been theretofore duly convicted on the 22nd day of June in the year 1935 in the Special Sessions Court of the County of Essex, in the State of New Jersey, before Honorable Edwin C. Caffrey, Judge of said Court, of a crime of violence, to wit, assault and battery with intent to beat, wound and ill-treat one James Johnson, did knowlingly, unlawfully and feloniously conceal and store a certain firearm, to wit, a .32 calibre Colt Automatic pistol, which said pistol had been theretofore shipped in interstate commerce; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

[fol. 59] A petition was filed by defendant, alleging that the "search and seizure was illegal, unreasonable, unjust, made without probable cause, without a search warrant, and not as an incident to a lawful arrest, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America."

He prayed that an order be made directing the Director of the Federal Bureau of Investigation and the United States Attorney for the District of New Jersey, and all other Federal Authorities, to return the property (the revolver is the only property shown to have been seized) taken by virtue of said search, to the defendant, and, generally, to have the information and evidence acquired by the search and seizure suppressed.

Upon the hearing on this petition, the defendant objected, first, that the seizure was unlawful, unreasonable and in violation of the defendant's rights under the Fourth and Fifth Amendments to the Constitution, and secondly, that the Federal Fire Arms Act, in so far as it relates to the indictment against the defendant, is unconstitutional.

As to the Alleged Illegal Search and Seizure

It is conceded that the arrest of the defendant was lawful in that the officers were armed with a warrant for the

arrest of the defendant. However, the defendant complains that, contemporaneously with the arrest, the officers ransacked the living quarters of the defendant in an exploratory search, and cites Go-Bart v. United States, 282 U. S. 344; Lefkowitz v. United States, 285 U. S. 452, and other decisions of the United States Supreme Court, holding such searches, even though incident to the service of an arrest warrant, to be a violation of Constitutional rights. The defendant fails to note that an important exception to searches and seizures, otherwise objectionable, is made in [fol. 60] the matter of relieving a defendant, who is being arrested, of a weapon or other thing which may be used to effect an escape from custody.

In Agnello v. United States, 269 U. S. 20, 30, the Court said:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See Carroll v. United States, 267 U. S. 132, 158; Weeks v. United States, 232 U. S. 383, 392."

This rule can be no less the law when the arrest is by virtue of a warrant, although the defendant is not actually engaged in the commission of a crime, as the facts in the case at bar disclose.

Any other action by the officer in this case might well have left the defendant in position to reach for his coat, possess himself of his revolver and effect his escape, with violent results to the agents, himself, or all. In justice to him, let it be noted that he frankly admitted possession of the revolver, and even offered to get it for the agent. But, if the agents' actions in this case were regarded as anything but lawful, provocation to escape and the hazard to the safety of the arresting officer would not be minimized, and, indeed, a premium would be placed upon such actions. The search for, and the seizure of, the revolver in this case, was reasonable and legal, and violated no Constitutional right of the defendant.

[fol. 61] As to the Alleged Unconstitutionality of the Federal Fire Arms Law as It Relates to the Indictment of This Defendant

It is contended that Section (f) of the Federal Fire Arms Law, 15 U. S. C. A. 902, conflicts with the guarantee provided in the Second Amendment of the Constitution, providing that:

"A well regulated Militia, being necessary to the security of a free State, the right of a people to keep and bear arms shall not be infringed."

This is the only reason set forth by the defendant for attacking the Act in question. In effect, the defendant contends that Congress is restrained by this Amendment from infringing upon the right of the people to bear arms. This is not the design of Congress in this legislation. On the contrary, it is apparent that Congress seeks here to control the interstate traffic in fire arms upon the part of criminals, and, in this respect, it is acting entirely within the scope of its powers.

Similar provisions for the control in Interstate Commerce, so as to minimize crime, have been held to be constitutional. Notable examples of this occurred in the instances of the so-called White Slave Act, 18 U. S. C. A. 397, *et seq.* and the National Motor Vehicle Theft Act, 18 U. S. C. A. 408, *et seq.*, the constitutionality of both of which has been sustained.

In Hoke v. United States, 227 U. S. 308, 322-323, the White Slave Act was upheld, and the Court said:

"Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those con- [fol. 62] ferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral.

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"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several States'; that the power is complete in itself, and that Congress as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations. Gloucester

Ferry Co. v. Pennsylvania, 114 U. S. 196, 215; Cooley, Constitutional Limitations, 7th ed. 856."

In Brooks v. United States, 267 U. S. 432, 437, the Court sustained the Constitutionality of the National Motor Vehicle Theft Act, and said:

"The objection to the Act can not be sustained. Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."

The effort, under the Federal Fire Arms Act, is a similar exercise by the United States of its powers over interstate commerce with incidental exercise of police power for the benefit of the public at large.

[fol. 63] The defendant specifically contends that this Act is inconsistent with his rights under the Second Amendment to the Constitution. With this contention I cannot agree. This legislation in no wise affects either the rights of the States to maintain their Militia or the rights of the people to keep and bear arms in a lawful manner within the States. This objection was considered in the case of United States v. Adams, 11 F. Supp. 216, 218 as follows:

"The second amendment to the Constitution, providing, 'the right of the people to keep and bear arms, shall not be infringed,' has no application to this act. The Constitution does not grant the privilege to racketeers and desperadoes to carry weapons of the character dealt with in the act. It refers to the militia, a protective force of government; to the collective body and not individual rights. This is well presented in State v. Workman, 35 W. Va. 367, 372, 14 S. E. 9, 14 L. R. A. 606, and is sustained by the following: Hill v. State, 53 Ga. 472; Civil Rights Case, 109 U. S. 3, 31 3 S. Ct. 18, 27 L. Ed. 835; Robertson v. Baldwin, 165 U. S. 275, 281, 17 S. Ct. 326, 41 L. Ed. 715; McKenna, The Right to Keep and Bear Arms."

Section (f) does not violate the Second Amendment to the Constitution.

The prayer of the defendant's petition will be denied.

* * * * * * *

[fol. 64] In District Court of the United States, District of New Jersey

197-c On Demurrer to the Indictment. Opinion

United States of America

vs.

Frank Tot

Appearances:

Attorneys for the Government,
William F. Smith, Esquire, United States Attorney, Trenton, N. J.
Irwin L. Langbein, Esquire, Special Asst. to the Attorney General, Department of Justice, Washington, D. C.

Attorney for the Defendant,
George R. Sommer, Esquire, 17 Academy Street, Newark, N. J.

Decision

This case is before the Court for determination of a demurrer to an indictment charging the defendant with violation of 15 U. S. C. A. 901 (f).

The indictment charges that the defendant had been convicted of certain crimes of violence and thereafter knowingly, unlawfully and feloniously received a firearm, to wit, a thirty-two calibre colt automatic pistol which had been shipped and transported in interstate commerce.

[fol. 65] The defendant contends that the demurrer should be sustained on two grounds: first, that the statute here involved, the Federal Firearms Act, 15 U. S. C. A. 901, is unconstitutional in that it violates the second amendment to the Constitution; and second, that the pistol involved is not a firearm within the definition of the statute.

On November 15, 1938, this defendant was indicted in the District Court for the District of New Jersey for a violation of the Federal Firearms Act. The defendant filed a petition requesting the suppression of certain evidence and the return of the seized pistol which is here involved, contending that the seizure was in violation of the fourth and fifth amendments to the Constitution and that the Federal Firearms Act is unconstitutional. In disposing of the petition in a well reasoned opinion, Judge Forman ruled that the Federal Firearms Act did not violate the second amend-

ment to the Constitution and denied the prayer of the petition. United States *vs.* Tot, 28 F. Supp. 900. Thereafter, the United States obtained an indictment superseding the indictment which was before Judge Forman. This superseding indictment is the one here under consideration. Under these circumstances, I shall not consider the constitutional question, but shall follow the ruling by Judge Forman wherein he held the Act to be constitutional. See Brussebach *vs.* Cago Corp., 24 F. Supp. 524; American Scantic Lines *vs.* U. S., 27 F. Supp. 271.

The Act, 15 U. S. C. A. 901 (3), provides that "The term 'Firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer, or any part or parts of such weapon."

The defendant contends that the firearm defined by the Act is a weapon and a muffler or any part or parts of that combination; that the word "and" is used in a conjunctive sense and not in a disjunctive sense; and that the weapon [fol. 66] here involved is of a type which is not a firearm within the definition above quoted.

At the argument, the defendant attempted to show that there has never been a silencer or muffler made which will fit a pistol of the type here involved and counsel for both sides agreed to this fact. The basis of this agreement was alleged in defendant's brief to be the statement made in a letter addressed to counsel for the defendant from the Colt's Patent Fire Arms Manufacturing Company that "• • • to the best of our knowledge and belief there never has *meen* a muffler or silencer made to fit one of our .32/c Automatic Pistols."

The indictment, however, charges that the defendant received a "firearm" in violation of the Federal Firearms Act. While the question of whether or not the particular weapon named therein is a firearm may ultimately be a question of law, in the first instance it is a question of fact which cannot be raised by demurrer. It is obvious that this Court cannot take judicial knowledge of the technical operation of firearms which permits some of them to be equipped with silencers or mufflers and prevents others from being so equipped.

The defendant does not contend that the indictment fails to allege sufficient facts to constitute a crime under the provisions of the Federal Firearms Act and it is clear

that the indictment does charge such a crime. The defendant does, however, attempt to attack the indictment by the addition of a fact which is not alleged. Such a demurrer, commonly called a "speaking" demurrer is improper and must be overruled.

Now, January 3, 1941, it is ordered that the demurrer to the indictment be and it is hereby overruled.

Albert L. Watson, United States District Judge.

[fol. 67] In United States District Court, District of New Jersey

Memorandum. No. 197-c

United States of America

vs.

Frank Tot

Appearances:

Charles M. Phillips, Esq., United States Attorney, By Irwin L. Langbein, Esq., Special Assistant to the Attorney General, for the United States.

George R. Sommer, Esq., Attorney for Defendant.

Decision—Filed December 6, 1941

Walker, District Judge:

The above entitled cause arises out of the Federal Firearms Act of 1938.[1] An original indictment[2] was returned on November 15, 1938. A petition to suppress evidence on the grounds of unconstitutionality of the statute and illegality of the search was filed by the defendant on December 1, 1938, and was denied on August 14,

[fol. 68] 1939.[3]

The original indictment was nolle prossed on January 13, 1941.

The present (superseding) indictment was returned on July 13, 1940, correcting errors of transcription in the verbiage of the original indictment. It alleges in substance that the defendant on a named date did unlawfully receive

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[1] Act of June 30, 1938, Ch. 850; 52 Stat. 1250-1252, Title

[2] No. 8857-b.

a "certain firearms, to wit, a 32 caliber Colt Automatic pistol", theretofore shipped in interstate commerce, the defendant theretofore having been convicted of a crime of violence. The statute prohibits any such person from receiving a "firearm" so shipped and provides that possession of a "firearm" by any such person shall be presumptive evidence of unlawful receipt after such shipment.[4]

A demurrer, raising the question of statutory construction was denied on January 3, 1941, on procedural grounds.[5]

Trial was had before the court and jury on January 22, 1941, and a verdict of guilty returned.

Motion "A".

During the trial the defendant contended the "32 caliber Colt Automatic pistol" recited in the indictment and admitted in evidence is not a "firearm" within the statute since the statutory definition of "firearm" restricts the term to silenced or muffled guns.

Decision was reserved pending ballistic expert testimony, which was received on January 27, 1941, and a 32 caliber Colt Automatic with silencer attached was tested on February 13, 1941.

Although the testimony received on January 27, 1941, teaches us and the test held on February 13, 1941, demon- [fol. 69] strates that a silencer can be attached to a 32 caliber Colt Automatic and a 32 Colt Automatic can be and was fired repeatedly with a silencer attached, the court deems it advisable to pass on the question whether or not the statute is restricted to a "firearm" designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer.

The defendant's contentions are: First, the statutory reference to a silencing device • • • "a firearm muffler or firearm silencer" • • • is not set off by punctuation from the preceding description of a gun • • • "any weapon • • • designed to expel a projectile • • • by the action of an explosive". Second, the intervening particle is the conjunctive "and" rather than the disjunctive "or".

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[3] United States *vs.* Tot (D. C. N. J.), 28 Fed. Supp. 900.

[4] Title 15 U. S. C. A. 902(f).

[5] United States *v.* Tot (D. C. N. J.), 36 Fed. Supp. 273.

Punctuation is one of the minor guides to construction. It is not control-ing and it will always give way in favor of the legislative intent and the sense of the words used.[6] The conjunctives "and" and "or" normally retain ordinary meanings when used in a statute, but there is no rule of construction which demands that they do so throughout perversion of sense or intent.[7]

The rule against statutory interpretation creative of "constructive offenses", emphasized by counsel for the defendant, does not operate to preclude inquiry into the sense and intent of criminal statutes but merely defeats ascertained sense or intent in "instances which are not embraced in the language employed by the statute or implied from a fair interpretation of its context."[8] Criminal statutes like [fol. 70] The Supreme Court answered the argument that the meaning of the statute in question is too plain and unambiguous to allow resort to any extraneous aids to construction when it said "It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. (Case cited.) The meaning to be ascribed to an Act of Congress can only be

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[6] For examples of Indictments sustained through disregard of punctuation of the Federal statute under which they were drawn see: United States *v.* Lacher, 134 U. S. 624, 628-629, 10 S. Ct. 625; United States *v.* Shreveport Grain & Elevator Co., 287 U. S. 77, 53 S. Ct. 42.

[7] United States *v.* Wight, 38 Fed. Rep. 106 (D. C. E. D. Mich.), Indictment sustained by reading "or" for "and". Construction followed by the Supreme Court in Wight *v.* Nicholson, 134 U. S. 136, 10 S. Ct. 487.

[8] Fasulo *v.* United States, 272 U. S. 620, 47 S. Ct. 200.

others "are not to be strained either way."[9]

[9] United States *v.* Bowman, 260 U. S. 94, 43 Ct. 39.

derived from a considered weighing of every relevant aid to construction." [10]

The instant statute was Bill S. 3 in both the 74th and 75th Congresses. It is notable that in all the debates on the statute, while it was in process of enactment, its application to nonsilenced guns was not questioned. On the contrary, there are comments both approving and disproving on the fact that the statute applies to a "gun of any type", and that it contains "the broadest definition that we could make",[11] that it includes "the ordinary duck-shooting gun, the gun with which the farmer's boy shoots the rabbit, the squirrel gun, the target gun".[12] The air gun and possibly the tear gas gun were the only ones intended to be excluded [13] presumably because air is not an "explosive" and tear gas is not a "projectile".

[fol. 71] The earlier National Firearm Act 1934 [14] roughly in pari materia was under discussion during the enactment process of the 1938 Act.[15] The earlier statute brought the silencer within its sharply restricted definition of "firearms" not as an essential of the weapon but as an independent sort of weapon. This is the construction which the government contends is proper for the 1938 Act. Indeed, when you compare the successive forms of the definition in S. 3 with those of the 1934 Act, you see a not too artful simplification of punctuation and verbiage.[16]

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[10] United States *v.* Dickerson, 310 U. S. 554, 60 S. Ct. 1034. See also: United States, *et al. v.* American Trucking Ass'ns. Inc. *et al.*, 310 U. S. 534, 60 S. Ct. 1059.

[11] House Subcommittee Hearings, June 22, 1937.

[12] Senate Committee Hearings April 16, 1935, page 10.

[13] Senate Committee Hearings April 16, 1935, pages 43, 56 and 57.

[14] Act of June 26, 1934, 48 Stat. 1240; Definition Section as subsequently amended now Internal Revenue Code Section 2733.

[15] House Subcommittee Hearings, June 22, 1937, page 12; Senate Committee Hearings, April 16, 1935, page 25.

[16] "The term 'firearm' means a shotgun or rifle having a barrel of less than 18 inches in length, or any other weapon except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, *and includes a muffler or*

The juxtaposition of the successive drafts of the 1938 Act, as more particularly set forth in Footnote No. 16, demonstrates the insignificance of the punctuation and participle upon which the defendant relies, by showing the casual and unpurposive manner in which they slipped into the statute. The first draft of S. 3, set off the weapon clause from the silencer clause by a semicolon, and like the 1934 [fol. 72] statute contained no "part or parts" clause. The elimination of the semicolon punctuation in the second draft could cause little confusion, for there were still only two ideas in the definition, the gun clause and the silencer clause. The addition of the "any part or parts" clause in the final draft when the construction of the definition had already been determined and its intent made clear in the Committee Reports for the first time gave importance to the comma and "or" by which this new clause "or any part or parts of such weapon" was set off, but the legislative intent is clear and the fair interpretation of the context of the statute was enacted, embraces the construction urged by the government.

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silencer for any firearm whether or not such firearm is included within the foregoing definition." National Firearms Act of 1934, 48 Stat. 1240.

"The term 'firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive; *and a firearm muffler or firearm silencer*". 79 Congressional Record 11973-11974: Senate, July 29, 1935. (S. 3).

"The term 'firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of explosive *and a firearm muffler and firearm silencer*". 81 Congressional Record 1527; 23 id. 9658-9659. (Senate Feb. 24, 1937, engrossment of S. 3, and identical form sent to House.)

"The term 'firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive *and a firearm muffler or silencer, or any part or parts of such weapon.*" 83 Congressional Record 9547, 9658-9. (House amendment of S. 3, agreed to by Senate, June 16, 1938; final form of the statute, except for repetition of "firearm" before "muffler". (Italics ours.)

The Treasury Department is given important functions by the statute in administering the licensing provisions [17] under which manufacturers pay $25.00 per year and dealers $1.00 per year to engage in interstate traffic in "firearms". The licensing provisions turn on the same definition of "firearms" as the penal provision involved in the instant case.

The administration of the licensing provisions has been delegated to the Bureau of Internal Revenue.[18] The Bureau has issued regulations under the Act rearranging and numbering the clauses to make explicit the essentially disjunctivet character of the mention of the gun and silencer in the Act.[19] Congress has had an opportunity to disapprove this administrative construction. It has not done so although it has subjected to subsequent amendment another [fol. 73] definition in the very same section of the statute.[20] This failure to amend is "at least persuasive of a legislative recognition and approval of the statute as construed".[21]

The contentions urged by the defendant are rejected, and we hold the 32 caliber Colt Automatic pistol in question is a firearm within the statute.

Motion "B"

The defendant alleges the evidence was insufficient to justify the court submitting the case to the jury and he moves to set aside the verdict of "guilty" returned by said jury.

The statute under which the defendant was tried and found guilty provides:

"It shall be unlawful for any person who has been convicted of a crime of violence * * * to receive any fire-

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[17] Title 15 U. S. C. A. 903.

[18] T. D. 4934, July 25, 1938.

[19] Section 315. 1. * * * (b) the term "firearm" means (1) any weapon by whatever name known, which is designed to expel a projectile, or projectiles by action of an explosive (2) any part or parts of such weapon, and (3) a firearm muffler or firearm silencer. (T. D. 4898, May 3, 1939, 5.)

[20] Ammunition Act of August 6, 1939, Ch. 500, 53 Stat. 1222.

[21] McCaughn, Collector *v.* Hershey Chocolate Co., 283 U. S. 488, 51 S. Ct. 510.

arm • • • which has been shipped • • • in interstate or foreign commerce, and the possession of a firearm • • • by any such person shall be presumptive evidence that such firearm • • • was • • • received • • • by such person in violation of this chapter." [22]

The government proved that on September 22, 1938, the defendant possessed the gun identified in the Indictment,[23] and that prior thereto he had been convicted of two crimes of violence.[24] It then rested.

[fol. 74] The defense consisted of testimony by the defendant one year before his marriage [25] he got the gun from an "unfortunate" on the city dumps. The testimony of his sister that prior to her marriage [26] she had seen the revolver in the wardrobe at home and the testimony of his wife [27] that she had seen the revolver in the wardrobe.

On rebuttal the government offered testimony that the gun had been made in Hartford, Connecticut and shipped on September 23, 1919 to Chicago, Illinois. The rebuttal testimony does not contradict the defense of intrastate acquisition and the government relies upon the statutory presumption in the absence of proof that the defendant unlawfully received a firearm shipped in interstate commerce. The presumption is not conclusive and irrebuttable.[28] It is rebuttable.

The presumption in the statute and upon which the government relies shifted the burden of going forward [29] but

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[22] Title 15 U. S. C. A. 902(f), Federal Firearms Act, effective date July 30, 1938, Title 15 U. S. C. A. 906.

[23] It was found in the pocket of a coat hanging in a wardrobe in the apartment where he was arrested after he admitted he had a gun in the pocket of a coat in the wardrobe.

[24] A burglary and an assault.

[25] 1934.

[26] Married about 1935.

[27] Who admitted that she had been convicted of crime.

[28] See: Mobile, Jackson & Kansas City Railroad Company *vs.* J. A. Tunipseed, Admr., 219 U. S. 35, 31 S. Ct. 136.

[29] Wigmore, Vol. IX, page 288, No. 2491.

not the burden of persuasion.[30] It placed upon the defendant the task of producing credible evidence. Even uncontradicted defense testimony must go to the jury for evaluation unless the trial court does not apprehend directly or intuitively doubt of its credibility. This court envisaged doubt of the credibility of the defense. Specifically in the record we have the following: Three witnesses were offered for the defense, two of them had been convicted of crime, and one of said two, namely, the defendant, gave the only explanation as to how the gun had been acquired. His [fol. 75] story that he received it from an "unfortunate" on the city dumps would test the credulity of the credulous.

Evidence which a judge finds—a jury might disbelieve, does not destroy the presumption even though the presumption does not shift the burden of persuasion.[31] In the face of the presumption and facts and circumstances tending to cast suspicion upon the testimony and the witnesses, the credibility and relative value of the evidence offered by the defendant was for the jury.[32]

We turn to the question whether there was adequate evidence to go to the jury on receipt of the gun by the defendant after July 30, 1938, the effective date of the statute.

Does possession subsequent to the effective date of the statute presume a receipt subsequent to July 30, 1938?

The defendant by his testimony and the testimony of his

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[30] See: Yee Hem vs. United States, 268 U. S. 178, 45 S. Ct. 470. The Statutory Presumption, 5 Tulane Law Review 17; United States v. Platt, *et al.*, (D. C. S. D. Texas), 31 Fed. Supp. 788.

[31] Morgan; Some Observations Concerning Presumptions, 44 Harvard Law Review 906. See also: Chaika v. Vandenberg, 252 N. Y. 101.

[32] Hawes v. Georgia, 258 U. S. 1, 42 S. Ct. 204; George A. Luria v. United States, 231 U. S. 9, 19, 34 S. Ct. 10; Stobble vs. United States (7th Cir.) 91 Fed. 2nd 69; Henry Woo vs. United States (4th Cir.) 73 Fed. 2nd 897, Cert. denied, 294 U. S. 714, 55 S. Ct. 512; Gowling v. United States (6th Cir.), 64 Fed. 2nd 796; Boyd v. United States (9th Cir.), 30 Fed. 2nd 900; United States v. Mule (2nd Cir.), 45 Fed. 2nd 132. See also United States v. Moe Liss, (2nd Cir.), 105 Fed. 2nd 144. Cf. Ezzard v. United States (8th Cir.), 7 Fed. 2nd 808.

witnesses tried to establish that he had the gun prior to July 30, 1938.

The statute was intended to apply to existing guns.[33] When the draftsmen recognized the difficult task of proving the manner of acquisition, they undoubtedly recognized that it would be just as difficult to prove when a defendant received a gun [34] as how he received it. Therefore, they said "possession of a firearm • • • by any person shall be presumptive evidence that such firearm • • • was • • • received by such person in violation of this Chapter." The word "Chapter" is a reflective reference to the [fol. 76] statute as a whole. It refers to the Section[35] fixing the effective date just as it refers to the other Sections and it extends the presumption beyond evidence of activity in interstate or foreign commerce and includes when as well as how.

A presumption similar to the one in the Firearms Act is found in the purchase section of the Harrison Narcotic Act • • • that possession of drugs without stamps "shall be prima facie evidence of a violation of this section" • • •. The presumption refers not only to the substantive crime of purchase but also to the venue of the purchase over the contention that the venue must be independently proved.[36]

The defendant in the case at bar had the burden of coming forward with credible evidence showing possession of the gun prior to July 30, 1938. or lawful possession subsequent to July 30, 1938.

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[33] Senate Report No. 82, 75th Cong., 1st Session; Senate Report No. 987, 74th Cong., 1st Session.

[34] The question does not arise as to guns made or shipped by the manufacturer or dealer subsequent to July, 1938.

[35] Title 15 U. S. C. A. 906.

[36] In re Casey vs. United States (9th Cir.), 20 Fed. 2nd 752, Aff'd., 276 U. S. 413, 48 S. Ct. 373; Killian vs. United States, 29 Fed. 2nd 455; Acuna vs. United States, (5th Cir.), 74 Fed. 2nd 359; Mullaney, et al. vs. United States (9th Cir.), 82 Fed. 2nd 638; Frank White vs. United States (9th Cir.), 16 Fed. 2nd 870, Cert. denied, 274 U. S. 745, 47 S. Ct. 660.

Rosenberg, et al. vs. United States (9th Cir.), 13 Fed. 2nd 369.

tion to set aside the verdict of guilty is denied.
endant is to present himself to this court on Mon-
mber 15, 1941, at ten o'clock in the forenoon for

N United States Circuit Court of Appeals, Third Circuit

Appendix to Appellee's Brief

In United States District Court

Testimony

(Caption)

ript of shorthand notes of testimony taken in the
tled matter on Monday, January 27, 1941, at the
ates District Court, Post Office Building, Newark,
ore his Honor, Thomas Glynn Walker, Judge of
t.

pearances:

. Langmuir, Esq., special assistant to the United
orney General, for the Government.
R. Sommer, Esq., for the defendant.

agmuir: If the Court please, this is the hearing
served motion in the case of the United States
t. The Government has just one witness here,
hman, of the F. B. I. May I put him on imme-

ri: You may. Proceed.

Thomas F. Baughman, sworn.

ect examination.

By Mr. Langmuir:

re do you live, Mr. Baughman?
rlington County, Virginia, just across the river
hington.
? is your occupation?
a special agent for the Federal Bureau of Investi-

Q. Do you have any specialized work at the Bureau?

A. I am assigned to the technical laboratory as a firearms expert.

Q. What is your title?

A. Consulting specialist in firearms.

Q. Have you devoted any study to firearms?

A. Yes, sir. I made a study of firearms for a great many years.

Q. Will you give us a very brief résumé of your education and experience in that field?

A. I have studied firearms, construction of firearms and ammunition construction and manufacture in arms plants, munition plants. I have studied firearms and firearms identification under qualified experts. I have lectured in our own school.

The Court: Meaning the F. B. I.?

The Witness: F. B. I. schools, and in police schools throughout the country.

[fol. 79] Q. For roughly how many years have you been working in that field?

A. I have been assigned to the technical laboratories for about six or seven years.

Mr. Langmuir: Do you wish to cross-examine on his qualifications?

Mr. Sommer: No.

Q. Mr. Baughman, will you please state for us in general what a firearm silencer is?

A. A silencer is a device attached to the muzzle of the firearm to cause the gas, the propelling gases, to be released more slowly than they would be merely by coming out of the muzzle without having any attachment thereto. It is in the nature of a muffler on an automobile. It is a device to trap and release the gases slowly.

Q. What, if anything, is the distinction between the terms of "firearm muffler" and "firearm silencer"?

A. I believe that the terms would be interchangeable.

Q. To what point of a gun is a firearms muffler firearms silencer attached?

A. To the muzzle, at the muzzle end. It is possible to attach the silencer to the slide or to the barrel, either one, of an auto-loading type of gun.

Mr. Langmuir: Mr. Reilly, may I have the gun exhibited, in the Tot case?

Q. Does the silencer have any effect upon the expulsion of a bullet from a gun?

A. No, sir, not if properly attached. The bullet should be expelled in the same fashion, and with no reduction in [fol. 80] velocity, as it would be expelled were the silencer not present.

Q. Do you know whether silencers are constructed for double barreled shot guns?

. . . . . .

(Objection, colloquy, overruling exception.)

. . . . . .

A. I have never heard of a silencer for a double barreled shotgun.

Q. In your opinion is it feasible or possible to construct a silencer which would operate on both barrels of a double barreled shotgun?

A. No, sir, I don't believe it feasible.

Q. Would you state the grounds for that opinion.

A. The silencer is a device having a series of discs in it, with holes through the center of those discs. The bullet or projectile, in passing out of the weapon and through the silencer, passes through the holes in those discs. In attaching the silencer to a double barreled shotgun you would necessarily interfere with and obstruct the second barrel. If the silencer were attached to one barrel of the weapon, it would necessarily obstruct the other barrel, or you would have to have a double silencer with a sufficiently large hole for the two shot charges to pass through,—that is, the shot charges from each individual and distinct barrel. If the holes were insufficiently enlarged for the charges from both barrels to go through, the effect would be lost.

Q. What is the relative exterior size of the gun silencer? [fol. 81] A. The exterior size is quite a bit larger than the barrel, necessarily so, to afford a space for the gas to expand behind the bullet within the silencer.

Q. And in a double barreled shotgun approximately what is the width of the rib or solid portion between the two barrels?

A. The barrels are immediately adjacent to each other, just a double thickness of the barrel mould between them.

Q. And if a silencer were mounted on the end of one of the barrels, would it or would it not project over so as to obstruct the other barrel?

A. It would, yes, sir.

Q. I show you a gun, Government's Exhibit G-2, is it?

The Court: That is it.

Q. (Continuing:) And I ask you whether in your opinion it is possible to mount a silencer on that type of gun.

A. Yes, sir.

Q. Would a silencer mounted on that type of gun in your opinion interfere with the effective operation of the gun?

A. No, sir.

Q. Have you ever seen a silencer mounted on that type of gun?

A. I have mounted one on that type of gun myself.

Q. Do you have that mounted silencer with you?

A. Yes, sir.

Q. Will you produce it, please.

Mr. Langmuir: I should like to state for the record that this comes from the F. B. I.'s arsenal, and I am not at liberty to introduce it. It is just offered here for explanation and for your Honor's information.

[fol. 82] A. For the purpose of illustration, the silencer, the thread was screwed on to the edge of the barrel, which was threaded to the receiver. The bullet in passing through here, as you will note by looking through the light, passes through here; but there are a series of discs which are turned over. Those discs have holes through them, so that the gas expands in the large diameter, and slowly escapes through those holes, and comes into the open air at a much reduced velocity. It is put on after opening this. It is cut a little at the end of the barrel. It is not shortening the barrel. It is threaded at the end.

The Court: May I see Exhibit G-2?

A. (Continuing:) Approximately this much of it, what is threaded. It is a very simple job. It took perhaps forty minutes to fix it.

Q. In a normal mounting of the silencer, Mr. Baughman, what means would be used for attachment let us say in the case of a rifle?

A. A similar system is usually the one followed. The end of the barrel is threaded and the silencer is screwed on. Sometimes there is an additional attachment put on to hold it,—that is, a small pipe-shaped piece of metal. It is threaded into the end of the barrel, the barrel being cut out to receive it, and the silencer screwed on.

Q. In your opinion, is the attachment of the silencer to the type of weapon herein involved, this 32 Colt automatic, a more difficult job than the attachment of a silencer to any of the other forms of weapons or guns to which silencers are ordinarily attached?

A. Yes, sir. It took me about ten to fifteen minutes longer to attach it to the automatic, which is with the slide, than it would have taken to attach it to a weapon without a slide. It [fol. 83] was necessary to cut out a little bit, to bell out the end of the slide, so that there would not be any interference. You see, this is rather tight fitting here, where the slide pulls back. You cut away a little bit of that metal inside. Here you see it enlarged. It is attached to this type of weapon. Just a little bit of the metal is cut out.

Q. One or two questions on the double barreled shotgun. Is the double barreled shotgun a common sporting weapon?

A. Yes. It is one in common use.

Q. Useful for rabbit hunting?

A. Yes, sir.

Q. Duck hunting?

A. Yes. Many of them we use in skeet shooting, and things of that kind.

Q. What is the difference between the ordinary double barreled shotgun, the sporting weapon, and the so-called sawed-off?

A. The saw-off weapon is merely one that has the barrel shortened to an extent greater or perhaps less than in the normal sporting weapon. You speak of a weapon with a barrel less than twenty inches usually as being sawed-off.

Q. For illustration, you have a sawed-off shotgun with you?

A. Yes, sir. The stock of this weapon has been cut off, as well as the barrel. The barrel here, you will note, sir, has been roughly sawed off with a hacksaw or some similar instrument, to shorten it to its present length. What its original length was I don't know. It now measures fifteen to sixteen inches, just less than sixteen inches.

Q. What is the usual length of the sporting shotgun?

A. The sporting shotgun, about twenty-six inches to thirty-two inches, shorter or longer.

[fol. 84] Q. Is this sawed-off shotgun that you are showing us a made up job, like the silencer automatic you just showed us?

A. No, sir. This is an evidence gun that came in in some case. The case file number is on here.

Q. But it is a gun from an actual case rather than from the laboratory?

A. Yes. It was an evidence gun.

Mr. Langmuir: Cross-examine.

Cross-examination.

By Mr. Sommer:

Q. Prior to your fixing this gun up by removing the metal from the slide and then cutting threads into the barrel, had your ever seen a Colt 32 automatic pistol with a silencer annexed to it?

A. No, sir.

Q. Do you know of any silencer that is manufactured for a Colt 32 automatic pistol?

A. No silencers of any kind for any weapons have been manufactured within the last ten years.

Q. Prior to that——

The Court: No silencers for any weapon?

The Witness: No, sir. They have discontinued its manufacture.

Q. Do you know of anyone being manufactured for a 32 Colt automatic pistol?

A. I have never seen one manufactured specifically for [fol. 85] the Colt 32. I have seen silencers of this type which can be attached to the 32, 32 calibre.

Q. Now, in its original condition, as G-2 is, it would be impossible to annex a silencer to it, would it not?

A. Well, to annex a silencer to any weapon you have to prepare the weapon for it,—that is, prepare threads to attach it, either with or attaching it by either brazing or welding. That is a means that you sometimes can use.

Q. In so far as G-2 is concerned, in its present condition, as you see it now, could a silencer be placed on that gun?

A. I don't see how I could answer that, sir, other than by the explanation which I have just given. Any weapon has to be prepared.

Q. I ask you for an answer to my question. Will you look at G-2, which is in front of you? Examine it closely, and tell me whether or not in its condition, as you see it now, it is possible to annex a silencer to it?

A. That is a question to which I cannot say either yes or no, because either one would be misleading.

Q. Well, now, you are an expert on firearms; is that correct?

A. Yes, sir.

Q. Now, will you look at G-2 and tell me whether in its condition as it now is it is possible to put a silencer on it?

. . . . . .

(Objection and colloquy, no ruling.)

. . . . . .

A. Any new weapon or any weapon which is not specifically made for a silencer must be prepared by being [fol. 86] either threaded or having the silencer attached by means of welding or brazing. The pieces of metal are not going to adhere to each other unless they are attached by some mechanical means.

Q. Now, will you answer my question after your explanation? Looking at G-2, in its present condition is it possible to attach a silencer to it?

A. By threading the barrel, yes, sir; not without threading the barrel.

Q. Let me ask you the question once more. In its present condition is it possible to annex a silencer to it?

A. Not without either threading the barrel or welding.

Q. In other words, your answer to my question is that in its present condition it is not possible to annex a silencer to it?

A. Yes, sir. It is possible to annex a silencer to it; but you have to prepare the gun for the silencer, of course.

Q. Well, now, I am going to repeat the question, and I want an answer to my question.

Mr. Langmuir: If the Court please, I object. I press my objection.

Mr. Sommer: I think the witness is fencing with me and trying to evade answering the question.

The Court: No. I can see the distinction, Mr. Sommer. "Is it possible in its present condition?" and the answer is, "Yes, if you add to the present condition by welding, or by threading."

The Witness: Threading.

The Court: Without that it cannot be done.

[fol. 87] Mr. Sommer: That is right, and that is the answer I want the witness to give me.

The Court: The record will show, "Without that it cannot be done."

The Witness: Yes, your Honor. Without threading or welding it cannot be done.

Q. Have you fired any shots from this gun without the silencer on it?

A. No, sir.

Q. Is it possible to fire more than one shot with that gun with a silencer on it?

A. I haven't fired this gun. From personal experience, not firing this gun, I can't say. I have fired many automatic pistols with silencers, and it worked satisfactorily.

Q. 32 Colt automatics?

A. No, sir.

Q. What is the strength of the undercarriage of that gun?

A. That I don't know, sir.

Q. What is the strength of the rollers of that gun?

A. By "undercarriage" I didn't understand what you meant. There are no rollers on that gun.

Q. There are no rollers there?

A. No, sir.

Q. There is an undercarriage?

A. I don't understand what you mean by "undercarriage." This is technically known as the receiver, not carriage.

The Court: What is that?

The Witness: The receiver, the portion that is in your hand when you fire.

[fol. 88] Q. Do you know what the effect on the barrel of that particular revolver would be if it were fired by having performed on it in the manner that you have, and placed that silencer on it?

A. No effect on the barrel.

Q. Sure the barrel wouldn't bend?

A. Yes, sir.

Q. Positive of that?

A. Positive of that, sir.

Q. What would be the effect on the automatic qualities of that pistol with that silencer on it?

A. I believe no effect at all, sir.

Q. Wouldn't it destroy its automatic qualities completely?

A. No, sir. Auto-loading. It is not an automatic. It is called an automatic; but it is strictly an auto-loading.

The Court: An auto-loading?

The Witness: An auto-loading, yes, sir.

Q. What would be the effect on it in so far as loading is concerned?

A. None.

The Court: Just a minute. I don't get the distinction.

The Witness: Being perhaps unduly technical for your Honor, this type of weapon is a self-loading or auto-loading weapon. That is, when the shot is fired the recoil ejects the empty cartridge case, and then as the slide moves forward it carries a fresh cartridge into the barrel of the pistol and leaves the weapon cocked and ready for another [fol. 89] pressure upon the trigger to fire a second shot. Strictly, an automatic weapon is one which is capable of firing more than one shot with one pressure on the trigger.

Q. You don't, then, know what the effect of a silencer annexed to this particular type of automatic pistol would have upon it, would you?

A. Not the 32 automatic. I believe it would have no effect. I have fired other calibre automatic pistols with silencer attached, and had no appreciable effect noticed.

The Court: Was it an increased calibre or decreased?

The Witness: Both 45, super automatics, and 22. It doesn't silence. It reduces the noise from 25 to about 60 per cent, varying on the type of weapon.

The Court: Is this silencer the type that is called a Maxim?

The Witness: Yes. This is a Maxim silencer.

Q. Now, on G-2 you find on the underside of the barrel a bearing, do you not?

A. I am not sure that I understand your question.

Q. On the underside of the barrel there is a bearing?

A. Yes, sir.

Q. What is the purpose of that bell?

A. As a guide for the barrel.

Q. And that guide is there for the purpose of keeping the barrel from turning, is it not?

[fol. 90] A. Yes, sir.

Q. When you annex the silencer you destroy that bearing, do you not?

A. No, sir. I remove a portion of it.

Q. Well, you destroy the bearing, don't you?

A. No, sir.

Q. In other words, you reduce the size of the bearing?

A. Very slightly, yes, sir.

Q. Let us see what you call "slightly". You cut it more than in half, did you not?

A. No, sir. I don't think I took as much as that off. Probably not over a third.

Q. Do you know what effect the reducing of the strength of the bearing would have?

A. I believe it would have no effect, sir.

Q. Do you know whether it would or not?

A. Not having tried this weapon, I don't know. But I believe it wouldn't. That is my opinion.

Mr. Sommer: That is all.

* * * * * * *

[fol. 91] STIPULATION CONCERNING GUN

(Caption)

It is stipulated that:

On February 13, 1941, at the Newark Police pistol range, in the presence of Honorable Thomas Glynn Walker, United States District Judge, and of both counsel, the Government's witness Parsons, a ballistics expert of the Federal Bureau of Investigation, demonstrated a gun of the same make and model as the gun introduced in evidence as Exhibit G-2. The gun demonstrated by Parsons was

the same gun previously exhibited to the Court by the Government's witness Baughman, in the course of Baughman's testimony, viz., a .32 calibre Colt automatic to which had been attached a reamed-out silencer, originally factory-made for a .25 gun but enlarged to permit the passage of a .32 calibre bullet. Parsons fired the gun repeatedly, both with silencer attached and not attached. When fired with silencer attached, there was an appreciable diminution of noise. Parsons also testified in the course of the above demonstration, but his testimony was not stenographically reported. Its substance is that he knew of no factory-made commercial silencer designed for a .32 calibre gun, that he believed it unlikely that there was one, and that if there were made a silencer originally designed for a .32 calibre gun it could be so designed and made as to have a greater silencing effect than the reamed-out .25 calibre silencer. The witness gave no opinion concerning the percentage of efficiency of the demonstrated silencer or the hypothetical .32 calibre silencer.

So stipulated this February 13th, 1941.

(Signatures.)

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[fol. 120] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7961

UNITED STATES OF AMERICA, Appellee,

vs.

FRANK TOT, Appellant

Appeal from the District Court of the United States for the District of New Jersey

And now, to-wit: this 7th day of July A. D. 1942, it is ordered that Hon. Guy K. Bard, District Judge, for the Eastern District of Pennsylvania, and Hon. —— ——, District Judge, for the —— District of ——, be, and he is hereby assigned to sit in above case to make a full court.

John Biggs, Jr., Circuit Judge.

Endorsements: Order Assigning Judge Bard for Argument. Received & Filed July 7, 1942. Wm. P. Rowland, Clerk.

[fol. 121] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7961

UNITED STATES OF AMERICA

vs.

FRANK TOT, Appellant

And afterwards, to wit, the 7th day of July, 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris and Honorable Herbert F. Goodrich, Circuit Judges, and Honorable Guy K. Bard, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 28th day of October, 1942, come the parties aforesaid by their counsel aforesaid, and

the Court, now being fully advised in the premises, renders the following decision:

[fol. 122] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1941

No. 7961

UNITED STATES OF AMERICA

v.

FRANK TOT, Appellant

On Appeal from the Judgment of the District Court of the United States for the District of New Jersey

OPINION—Filed October 28, 1942

Before Maris and Goodrich, Circuit Judges, and Bard, District Judge

GOODRICH, Circuit Judge.

The defendant, Frank Tot, was convicted and sentenced for violation of the statute known as the Federal Firearms Act by which it is made unlawful for any person who has [fol. 123] been convicted of a crime of violence "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce • • •"[1] That defendant had been previously convicted of a crime of violence, as defined in the Act, is undisputed. He was arrested by federal officers at his home in Newark, N. J. on a warrant charging theft of cigarettes from an interstate shipment. A .32 caliber Colt Automatic pistol, was found in his place of residence at the time of the arrest, which took place on September 22, 1938. In this appeal the appellant raises several questions of difficulty and importance concerning the statute cited. Additional facts necessary for presentation of the legal questions involved will be made in connection with the question to which they are relevant.

Search and Seizure

At various stages of the proceedings after his arrest, appellant made timely motions for the suppression and return of the gun and that any evidence pertaining to it, which

[1] 15 U. S. C. A. (1939) § 902(f).

had been admitted over his objection, be stricken. All of these motions were denied. Their basis was the appellant's contention that the gun had been obtained in violation of his Constitutional guarantee, under the Fourth Amendment, against unreasonable searches and seizures.

Since what the Constitution prohibits is unreasonable search and seizure it is inevitable that the courts are confronted with marginal cases and that sometimes the line between what is held reasonable in one case and unreasonable in another becomes faint. Some searches and seizures incident to a lawful arrest are permitted; others are not.[2] The facts presented here, however, do not show a case close to the line where our result would be indicated only by a careful analysis and differentiation among authorities by which we are bound. We are not here confronted with the prob- [fol. 124] lem of the propriety of the seizure if the officers had found a quantity of cigarettes about the accused's premises and seized them as evidence of his complicity in the crime with which he was charged in the warrant of arrest. Still less are we concerned with the legality of a seizure of some article of contraband like a package of opium or a container of untaxed alcohol. The only article seized here was the gun. Undoubtedly upon Tot's arrest under a valid warrant, as this was, his person could have been searched and the weapon taken from him.[3] The same privilege to search the place where the arrest is made "in order to find and seize things connected with the crime as its fruits • • • , as well as weapons and other things to effect an escape from custody, is not to be doubted."[4]

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[2] Cf. United States v. Lefkowitz, 285 U. S. 452 (1932) and Go-Bart Importing Company v. United States, 282 U. S. 344 (1931) with Marron v. United States, 275 U. S. 192 (1927).

[3] 4 Am. Juris., Arrest, § 68.

[4] Agnello v. United States, 269 U. S. 20, 30 (1925). The Court states that this privilege exists where the arrest is made for a crime committed in the presence of the arresting officers. The latter requirement merely establishes the lawfulness of an arrest without a warrant, as in the Agnello case. When the arrest is made with a warrant, as here, the requirement is unnecessary, for then, the privilege of search and seizure, being incidental to a lawful arrest, is as extensive.

ing of the warrant and the taking of the gun
ers were practically a contemporaneous trans-
e evidence shows that Tot was asked if he had a
it he replied in the affirmative. He stated that it
pocket of his coat which was hanging in a ward-
in his bedroom. Whether this conversation took
kitchen, where the arresting officers entered or
ng bedroom, is disputed. We think it does not
here was also testimony that Tot offered to get
self and that this unusual offer was declined by
one of whom went to the closet, found the coat,
e gun and took possession thereof. It might
that defendant's offer to produce the gun con-
onsent on his part to its taking by the officers.
of this, however, we think it apparent that the
his case is clearly within the rule stated by the
Court as one not to be doubted under which
weapons and other things which may be used to
scape from custody may be seized without a
rant upon a lawful arrest.

l search of the premises was made, however,
y warrant the officers had was the one for the
e accused. If we assume, solely for the purpose
on, however, that the search was wider than
nal limitations permitted, does this invalidate
and the seizure of the weapon which was other-
as an incident to the arrest? The analogy at
ted is the ancient doctrine of trespass ab initio
bsequent misconduct of a party entering under
n by law may render the original entry tortious.
owever, this doctrine does not invalidate the
act for the accomplishment of which the privi-
Nor is it applicable to criminal prosecutions
the United States.[6] Our conclusion is that un-
ts of this case the defendant may not complain
of Constitutional rights in the search and seiz-
gun, and the overruling of his various motions
ons based on this theory were correct.

ement, Torts (1934) § 214, comment f.
v. United States, 273 U. S. 95, 98, 99 (1927).

Meaning of the Statute

Appellant's second contention is that the correct construction of the statute does not include the gun which was in his possession at the time of his arrest. In defining the term "firearm" the Congressional language states that it "means any weapon, • • • which is designed to expel a projectile • • • by the action of an explosive and a firearm muffler or a firearm silencer, or any part or parts of such weapon."[7]

The pistol here in question was not equipped with a silencer nor is there, according to the testimony of the government's expert, a commercially made silencer for this .32 [fol. 126] caliber weapon. It is conceded, however, that a silencer could be made for it and there is evidence of a demonstration of the successful fitting and operation of a made-over .25 silencer on a gun of the same make, model and caliber. The appellant's argument is that the plain words of the statute, in which the conjunctive "and" is used instead of the disjunctive "or" or a combination of the two, limits the application of the statute to guns which are provided with a silencer, or where one may readily be applied. This being the plain meaning, he says, and the statute a penal one, resort should not be had to extrinsic sources like Treasury Regulations or legislative debates and hearings to give it some other meaning.

If the premise of plain meaning were acceptable, there is something to be said for the suggested conclusion. We do not agree with the appellant's argument about the plain meaning. The statute as a whole indicates an ambitious plan for dealing with firearms in interstate commerce. The very sentence upon which appellant relies shows, in the last phrase, the intent of Congress to deal with the parts as well as the whole. The appellant's interpretation of the language requires the word "and" to be read as "combined with". This, it seems to us, is quite a jump from plain meaning. It is a much narrower construction than we believe Congress meant in view of the statute as a whole and the concluding clause of the sentence referred to.

That Congress had no such narrow limitation in mind is clear from the discussion of the statute prior to its passage. Both the proponents and opponents of the Act

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[7] § 901 (3).

thought of its provisions in the broadest terms, applicable to a "gun of any type", "firearms of all kinds", etc.[8] This reference is not made to put in the statute something which is not there. But, it is a matter for consideration in de- [fol. 127] termining what the scope was of the problem the legislature had in mind.[9]

There is an additional point of administrative regulation also. Section 903 of the Act relates to licensing of manufacturers of and dealers in firearms and this is committed to the Treasury. Regulations were issued under which the clauses were rearranged and numbered to make explicit the disjunctive relation of the gun and the silencer.[10] The Congress subsequently amended the definition of ammunition in the very same statute.[11] The opportunity was then present to modify the firearms definition if the Congress

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[8] Hearings before Senate Committee on Commerce on S.3, 74th Cong., 1st Sess. (1935) 10, 13, 15, 44; Hearings before H. R. Subcommittee of the Committee on Interstate and Foreign Commerce on S.3, 75th Cong., 1st Sess. (1937) 4, 5, 18. Sen. Rep. No. 997, 74th Cong., 1st Sess. (1935) 1; Sen. Rep. No. 82, 75th Cong. 1st Sess. (1937) 1.

[9] It is also noteworthy, that the first two drafts of this Section interposed a semi-colon between "explosive" and "and". See next as it appears in Senate Hearings, supra at pp. 1, 2 and in 79 Cong. Rec. 11973, 11974 (1935). The semi-colon was absent in the third draft which was sent without further amendment to the House. See H. R. Hearings, supra, at pp. 1-3. The Senate Report on the third draft states that the only change from prior drafts in the bill appears in a section, other than the one under consideration. See Sen. Rep. No. 82, supra, H. R. Hearings, supra, at p. 13. This legislative history indicates that the omission of the semi-colon in the final draft was unintentional. With that punctuation mark, it is clear that the statute meant guns with or without silencers as is otherwise apparent from the Hearings, supra.

[10] "The term 'firearm' means (1) any weapon, by whatever name known, which is designed to expel a projectile or projectiles by action of an explosive, (2) any part or parts of such weapons, and (3) a firearm muffler or firearm silencer." 26 Code Fed. Regs., 1939 Supp. (1940) § 313.1(b).

[11] August 6, 1939, 15 U. S. C. A. (Supp. 1941) § 901(8).

had considered that the administrative officers had carried it beyond its original meaning. We think this is a case where what the Treasury had evidenced as being its understanding of the meaning of the statute, "Congress impliedly confirmed as being correctly interpretative of the legislative intent."[12] Our conclusion upon this point is that the pistol here in question was within the definition of firearms given in the statute.

[fol. 128] The Second Amendment

The Second Amendment to the Constitution of the United States provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

The appellant's contention is that if the statute under which this prosecution was brought is to be applied to a weapon of the type he had in his possession, then the statute violates the Second Amendment.

It is abundantly clear both from the discussions of this Amendment contemporaneous with its proposal and adoption, and those of learned writers since[13] that this Amendment, unlike those providing for protection of free speech and freedom of religion, was not adopted with individual

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[12] Aluminum Co. of America v. United States, 123 F. (2d) 615, 620 (C. C. A. 3, 1941). The Regulation does not, on the facts here, gain authority from its long standing character. It became effective May 1, 1939. The statutory amendment came in August of the same year. But the subject matter of the statute, and obviously especially the definitional provisions, were before Congress during the dates mentioned.

[13] 1 Elliot's Debates on the Federal Constitution (2d. Ed. 1901) 371, 372 (Luther Martin's letter to the Maryland Legislature); 4 id. 203 (Lenoir, North Carolina Convention); 5 id. 445 (Sherman of Connecticut at the Federal Convention). Emery, The Constitutional Right to Keep and Bear Arms (1915) 28 Harv. L. Rev. 473; Haight, The Right to Keep and Bear Arms (1941) 2 Bill of Rights Rev. 31; McKenna, The Right to Keep and Bear Arms (1928) 12 Marq. L. Rev. 138.

rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power.[14] The experiences in England under James II of an armed royal force quartered upon a defenseless citizenry [15] was fresh in the minds of the Colonists. They wanted no repetition of that experience in their newly formed government. The almost uniform course of decision in this country,[16] where provisions similar in language are found in many of the State constitutions, bears out this concept of the Constitutional guarantee. A notable instance is the refusal to extend its application to weapons thought incapable of military use. [fol. 129] The contention of the appellant in this case could, we think, be denied without more under the authority of United States v. Miller, 307 U. S. 174 (1939). This was a prosecution under the National Firearms Act of 1934 and the weapon, the possession of which had occasioned the prosecution of the accused, was a shotgun of less than 18 inch barrel. The Court said that in the absence of evidence tending to show that possession of such a gun at the time has some reasonable relationship to the preservation or efficiency of a well regulated militia "could not be said that the Second Amendment guarantees the right to keep such an instrument. The appellant here having failed to show such a relationship, the same thing may be said as applied to the pistol found in his possession. It is not material on this point that the 1934 statute was bottomed on the taxing power while the statute in question here was based on a regulation of interstate commerce.

But, further, the same result is definitely indicated on a broader ground and on this we should prefer to rest the matter. Weapon bearing was never treated as anything like an absolute right by the common law. It was regulated by statute as to time and place as far back as the Statute of Northampton in 1328 and on many occasions since.[17] The decisions under the State constitutions show the upholding

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[14] As to the latter, see The Federalist, Nos XXIV-XXIX and No. XLVI.

[15] See Aymette v. State, 21 Tenn. 154 (1840); also law review articles in f.n. 13.

[16] See Haight, supra and McKenna, supra.

[17] See Emery, supra at pp. 473, 474.

of regulations prohibiting the carrying of concealed weapons, prohibiting persons from going armed in certain public places and other restrictions, in the nature of police regulations, but which do not go so far as substantially to interfere with the public interest protected by the Constitutional mandates.[18] The Federal statute here involved is one of that general type. One could hardly argue seriously that a limitation upon the privilege of possessing weapons was unconstitutional when applied to a mental patient of the maniac type. The same would be true if the possessor were a child of immature years. In the situation at bar Con- [fol. 130] gress has prohibited the receipt of weapons from interstate transactions by persons who have previously, by due process of law, been shown to be aggressors against society.[19] Such a classification is entirely reasonable and does not infringe upon the preservation of the well regulated militia protected by the Second Amendment.

Refusal of Directed Verdict and Request for Charge

The questions raised by the appellant under this heading may be considered together. The alleged error in refusal to dismiss the indictment or to direct a verdict relates, so far as this point goes, to the matter of the government's proof and the charge which was requested and refused concerns the same matter. The statute which makes it unlawful for any person who has been convicted of a crime of violence to receive a firearm which has been shipped in interstate commerce provides that "the possession of a firearm • • • by any such person shall be presumptive evidence that such firearm • • • was shipped or transported or received • • • by such person in violation of this chapter." § 902(f). The prosecution showed a possession of the weapon already described[20] by the

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[18] See f.n. 16.

[19] The statute is applicable to anyone who has been convicted of a crime of violence which is defined as "murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year." § 901(6).

[20] The instrument itself was in evidence as a government exhibit.

defendant at a date when the statute was in effect. Proof of prior conviction of a crime of violence was also shown. The prosecution then rested. The defendant introduced testimony by himself, his wife and his sister tending to show continuous possession of the gun from a date several years prior to the passage of the statute. Rebuttal testimony for the prosecution was confined to one witness, employed by the manufacturers of the gun, who showed [fol. 131] its shipment in 1919 from the factory in Connecticut to a business firm in Illinois. The defendant by a timely motion asked for a directed verdict and a dismissal of the indictment on the theory that having offered evidence to show his possession prior to the effective date of the statute the presumption created by the statute disappeared and in the absence of additional evidence against that offered by him, he was entitled to have his motions granted. He backs that up with words from Wigmore to the effect that a presumption is merely to invoke a rule of law compelling the jury to reach a conclusion in the absence of evidence to the contrary, and if such evidence is offered, the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule.[21] In addition the appellant cites one State decision which seems squarely to apply the rule as he would have it.[22]

We think the answer to the appellant's point here is completely stated in the words of Professor Bohlen in "The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof":[23] "It is the duty of him against whom any presumption operates to produce evidence, not merely witnesses, and therefore he must satisfy the jury of the credibility of his witnesses." Simply causing words to be uttered is not enough. The two women witnesses offered

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[21] 9 Wigmore on Evidence (3rd Ed. 1940) § 2941.

[22] McIver v. Schwartz, 50 R. I. 68, 145 Atl. 101 (1929), but contra see O'Dea v. Amodea, 118 Conn. 58, 170 Atl. 486 (1934) and see the adverse comment on the McIver case by Morgan in Instructing the Jury Upon Presumptions and Burden of Proof (1933) 47 Harv. L. Rev. 59, 78-81; Some Observations Concerning Presumptions (1931) 44 Harv. L. Rev. 906, 912-913.

[23] (1920) 68 U. of Pa. L. Rev. 307, 315 f.n. 13.

by the defendant distinctly faltered in the certainty of their identification of the weapon made so readily upon direct examination.[24] Defendant stuck to his story, but

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[24] On cross-examination:

Appellant's wife:

Q. You are not an expert on guns?

A. No.

. . . . . .

Q. Are you able to tell us definitely and certainly the way you appeared to tell us on direct examination, Mrs. Tot, that it was this gun that your husband had rather than some gun of the same make and calibre, general appearance or what not?

A. Well, I cannot tell you definitely, but it was one like it.

Q. It was one like it. It might have been some other gun?

A. Well, I don't know guns, one from the other.

Q. I see. All you are able to tell us is that your husband Frank Tot had a gun.

A. Yes, sir.

. . . . . .

Q. And you are unable to tell us even roughly, I take it, how many times all told you saw the gun?

A. No.

Appellant's sister?

A. Oh, I should say not.

Q. Are you a gun expert?

Q. Then I take it you don't know either whether this is really the same gun that you say you saw?

A. Well, it reminded me of a water pistol; that is why I know it.

Q. I take it——

A. I don't mean I know it, but the name on it.

Q. The name Colt?

A. That's right.

Q. You know your brother had a Colt gun, is that it?

A. That's right.

. . . . . .

Q. Then, what you know is that your brother used to have a Colt gun that looked like a water pistol?

[fol. 132] it had some elements which certainly made a basis for doubting its truthfulness even without reference to his previous criminal record. We think the most the defendant was entitled to have was a fair submission of the question to the jury. And this, as will be pointed out presently, was given. The constitutionality of presumptions more difficult to rebut than the one here involved has been sustained by the Supreme Court.[25]

Defendant asked an instruction, which was refused, "That such presumption is never evidence and if you find that this presumption has been repelled by the evidence you must acquit." The presumption referred to is that in the statute already quoted.

[fol. 133] To give the instruction in the language asked for by the defendant would have been confusing to the jury. Statutory language is to the effect that possession of the weapon is presumptive evidence of violation. For the court, after having quoted the statute, to tell the jury

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A. One of those things just like you have in your hand.

* * * * * * *

Q. You would see the gun in the drawer?

A. That's right.

Q. Or to be more precise, you would see a gun in the drawer, right?

A. Of course, a gun.

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[25] Yee Hem v. United States, 268 U. S. 178 (1925) (Jones-Miller Act. "* * * such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury"); Hawes v. State of Georgia, 258 U. S. 1 (1922) State statute which provided that distilling apparatus found upon land shall be prima facie evidence that the person in possession of the premises had knowledge of the existence thereof, held Constitutional, although defendant was not allowed to testify under oath or to have the testimony of his wife; Fong Ye Ting v. United States, 149 U. S. 698 (1893) Chinese found in United States without prescribed evidence as to lawful residence to be deemed to be unlawfully in United States unless each establishes by one credible white witness facts to the contrary.

that such presumption is not evidence would certainly have not tended to clarity in their minds. But the learned judge did much more than refuse an instruction which would have caused confusion. His charge on the point was clear and helpful. He told the jury at least twice that the burden was on the United States to establish defendant's guilt beyond a reasonable doubt and told them, too, that the burden did not shift. He left it to the jury to find whether the defendant obtained the gun subsequent to June 30, 1938 and emphasized to them that they were the sole judges of the facts concerning this statement especially as to the testimony offered by the defendant. Then he repeated the ultimate issue in the final paragraph of his charge. We think this left the matter clearly to the jury in a way in which they could understand and gave the defendant the full benefit of the testimony of his witnesses if that testimony was to be believed. More than this he cannot ask.

Constitutionality of the Statutory Presumption

By far the most difficult problem in this case is the constitutionality of a presumption created in § 902(f). After declaring it unlawful for any person convicted of a crime of violence to receive any firearm in interstate or foreign commerce, the provision is that the possession of a firearm by such person shall be presumptive evidence that such firearm was received by such person in violation of the chapter.[26] The appellant did not press this point in his main brief or oral argument, though he discusses that portion of the government's argument in his reply brief. Nevertheless, because this is the first time the statute has [fol. 134] been before an appellate court for consideration we think that fairness to the accused requires consideration of this problem as well as the other points already discussed.

The obvious offhand response to such presumption in a criminal statute is that it violates the fundamental concept that a man is innocent until proved guilty by putting on him the burden of producing the facts which establish his innocence. Such a sweeping objection comes many years too late.[27] Mr. Justice Lurton, speaking for the Supreme Court

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[26] 15 U. S. C. A. (1939) Ch. 18.

[27] See note, Statutory Presumptions and Due Process of Law (1929) 43 Harv. L. Rev. 100.

in Mobile, J. & K. C. R. R. v. Turnipseed, 219 U. S. 35, 43 (1910), stated a test that has many times been repeated. "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process • • • [if there is] some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." This test was approved and applied fifteen years later to uphold a criminal prosecution under a statutory presumption in the Harrison Narcotics Act, Yee Hen v. United States, 268 U. S. 178 (1925). More recently, the late Mr. Justice Cardozo, speaking for the Court in Morrison v. California, 291 U. S. 82, 88 (1934), states the testament somewhat more broadly. "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression."

The problem, therefore, becomes much narrower than at first appears, in view of the test of the constitutionality [fol. 135] above set out. So far as the application to the facts of this case are concerned, we think the considerations show that the presumption is constitutional as applied to an interstate commerce shipment whether the more limited formula of the Turnipseed case or the broader generalization found in the Morrison case is followed. The gun in question certainly had two interstate journeys because it was proved that it was originally shipped from Connecticut to Illinois and it was found in the defendant's possession in New Jersey. Acquisition in New Jersey under the New Jersey law would not have been easy. New Jersey, in common with many other States,[28] has rather stringent regu-

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[28] For a collection of State regulations, see 3 Prentice-Hall 1942, Fed. Tax. Serv. Par. 31502. For New Jersey specifically, see N. J. Rev. Stat. (1937) 2:176—3, 4, 5, 8, 33, 44.

lations surrounding the transfer of firearms of this type. The tendency is to require such transfers to be open, to make them more difficult and certainly to put obstacles in the way of acquisition by persons of criminal records like that of the defendant.

Furthermore, Congress had, when the Federal Firearms Act was under consideration, evidence dealing with the interstate activity of armed law breakers.[29] In determining the constitutionality of the legislative solution of a problem courts are not to ignore the existence of such facts before legislative bodies even though the evidence of those facts is not part of the record in a particular case. United States v. Carolene Products Co., 304 U. S. 144 (1938). We think these considerations are sufficient to protect the statute created presumption from the charge of arbitrariness.

The scholarly counsel for the government presented another basis on which the presumption might be upheld. [fol. 136] It is based upon the decision in Ferry v. Ramsey, 277 U. S. 88 (1928). There the Supreme Court upheld the constitutionality of a statute imposing civil liability upon a bank director for assenting to the receipt of deposits after knowledge of insolvency of the bank adding a presumption of knowledge of insolvency and assent to receipt where deposits were so received. Through Mr. Justice Holmes the majority of the Court recognized that the legislature had power to impose the liability regardless of knowledge. That being so, to do something less, in terms of a statutory presumption, is not unconstitutional. On that foundation the argument is made that Congress, under the commerce clause, could have made it a substantive crime for persons with records like that of the defendant to possess guns upon the theory that criminals with guns are the kind most

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[29] 1 Hearings before Senate Subcommittee of the Committee on Commerce, pursuant to S. Res. 74, 73rd Cong., 2nd Sess. (1933) 9. The Federal Firearms Act was partly the result of the evidence adduced at these hearings authorized by S. Res. 74, entitled: A Resolution Authorizing an Investigation of the Matter of So-called "Rackets" with a View to Their Suppression. See S. Hearings, supra, f.n. 8 pp. 1, 19 and H. R. Hearings, supra, f.n. 8 pp. 3, 4.

likely to engage in interstate journeys.[30] The argument then concludes that if possession itself could have been penalized under the interstate commerce power, a statutory presumption of interstate shipment. however inept a way of reaching the same result, is not unconstitutional. This may be sound. We do not deem it necessary to go so far in this case. As stated above, we believe the presumption of interstate shipment can be sustained under orthodox formulae many times enunciated.

We now come to the last question, that of the application of the statutory presumption as to the time of the acquisition of the weapon found in the possession of the defendant. The statute became effective July 30, 1938. § 906. The trial judge's instruction told the jury that the presumption was that the gun was shipped in interstate commerce if the jury found defendant obtained it subsequent to June 30, 1938.[31] The only direct evidence bearing [fol. 137] on time of acquisition was that given by the defendant and his wife and sister. This testimony the jury evidently disbelieved as shown by its verdict of guilty. But without positive testimony by the government showing the time of acquisition the verdict cannot stand unless the statutory presumption applies both to the interstate commerce nature of the transaction and to the time thereof. If it does the defendant has no ground for complaint by reason of the jury's failure to follow the trial judge's instruction.

We have no doubt that the possession of the firearm by

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[30] See S. Hearings on "Rackets" supra, f.n. 29, v. 1, pt. 2, pp. 220, 261, pt. 3, pp. 276, 354. See also, Department of Commerce, Bureau of the Census, The Prisoner's Antecedents (1929) p. 12, table 5, and pp. 54-57, table 36, showing the tendency of criminals to roam, specifically indicating the correlation between gun offenders and non-residency in the state where the offenses were committed.

[31] The statute was enacted June 30, 1938, but became effective by its terms, 30 days thereafter. The instruction was therefore incorrect in placing emphasis on the June 30 date. As we view the case, however, this was harmless error. There was no evidence whatever indicating acquisition of the weapon between June 30 and July 30. If the defendant's evidence was to be believed, he had acquired the gun years before.

one of the class of persons designated in the statute is intended to be treated as presumptive evidence both of the fact of interstate shipment and the time of receipt by such person. The words used quite evidently relate to the whole statute. "• • • possession • • • shall be presumptive evidence that such firearm • • • was shipped • • • or received, • • • by such person in violation of this chapter." § 902(f). The chapter is the whole statute including § 906 which provides for its effective date and ending with § 909 giving its short title.[32] White v. United States,[33] a case under the importation section of the Harrison Narcotics Act, is an authority in point in the application of the "presumptive" evidence provision to the time element.

Can presumption of acquisition in violation of the law be constitutionally applied? The government frankly admits that tested alone by the rational connection[34] between the fact proved and the fact presumped, presumption is indefensible. The evidence showed that the gun was shipped by its manufacturer in 1919 and that Tot was arrested and [fol. 138] the weapon seized in September, 1938. The likelihood that he acquired it in the short time between the effective date of the statute and the date of his arrest is admittedly slight.

But on the question of opportunities for knowledge mentioned in the phrasing of the test by Mr. Justice Cardozo, in the Morrison case, cited above, there is much more to be said. A man in possession of the gun is certainly in a position to know better than anybody else, when he got it. The statute does not, as warned against in the Turnipseed case, at page 43, "operate to preclude the party from the right to present his defense from the main fact thus presumed". The defendant in this case did present his evidence. It would clearly, if believed, have established possession long

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[32] One section of the statute (§ 904) expressly deals with exceptions. Certain persons are excepted and so also, certain firearms; these are those which are "antique or unserviceable." This case is not concerned with them.

[33] 16 F. (2d) 870 (C. C. A. 9, 1926), cert. den. 274 U. S. 745 (1927).

[34] As stated in the Turnipseed case, supra.

ıte was passed. That the trier of the fact
one's story is a risk common to all litigants,
be granted that it bore particularly hard
e previous criminal record was already in
ıt be borne in mind that the legislation here
in its scope as directed against all citizens
ı of inherently innocent objects. It is deal-
ıs. And it is directed only at that narrow
ı already been convicted of crimes of vio-

may be approached from another angle
ne result. That the legislature in accom-
ittedly lawful and constitutional object may
t sought by a means which when considered
ight be unconstitutional is well established.
mes states the point in characteristic epi-
the law allows a penumbra to be embraced
l the outline of its object in order that the
cured."[35] The concept is no stronger or no
ıg it the penumbra doctrine.[36] There are
ous instances of this power. Thus a statute
e removal of original marks from imported
onstitutional, even after the latter have
State, as one reasonably calculated to ren-
principal requirement that the goods bear
me of importation. United States v. Ury,
C. C. A. 2, 1939). A State statute forbid-
sion of game during the closed season is
en if applied to game taken elsewhere and
State. Silz v. Hesterberg, 211 U. S. 31
ions requiring certain labeling of denatured
ble as a beverage, were upheld within the
ss under the Eighteenth Amendment. Selz-

v. Wisconsin, 270 U. S. 230, 241 (1926). The
n the dissenting opinion. The presumption
tion in that case was a so-called "conclusive
hich, of course, presents quite a different
e one under consideration here.

r, Black, The Penumbra Doctrine and Pro-
ment (1933) 27 Ill. L. Rev. 511, where the
its application in a series of prohibition

man v. United States, 268 U. S. 466 (1925). So, too, forbidding the prescribing of intoxicating malt liquors for medicinal purposes was upheld as an aid to prohibition enforcement. Everard's Breweries v. Day, 265 U. S. 545 (1924). Likewise, the forfeiture of empty barrels, bottles, corks and cartons was sustained. Danovitz v. United States, 281 U. S. 389 (1930). The list which does not pretend to be exhaustive, may be closed with reference to United States v. Darby, 312 U. S. 100 (1941), a case under the Fair Labor Standards Act, where the Court said "• • • Congress • • • may require the employer, as a means of enforcing the valid law, to keep a record showing whether he has in fact complied with it. The requirement for records even of intrastate transactions is an appropriate means of the legitimate end."

The social end sought to be achieved by this legislation, the protection of society against violent men armed with dangerous weapons, all would concede to be fundamental in organized government. The entry of the federal authority in the field to help accomplish this purpose has not been challenged. It has been taken for granted by both sides in the discussion of this case. We also think it may be assumed. In accomplishing the admittedly constitutional object we do not think the means taken by this statute, while stringent, have become so oppressive and arbitrary that we are en-[fol. 140] titled to say that Congress has exceeded its authority in acting without due process of law.

The judgment is affirmed.

A true Copy:

Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 141] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1941

No. 7961

United States of America

vs.

Frank Tot, Appellant

On Appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the — District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

October 28, 1942. Goodrich, Circuit Judge.

Endorsements: Order Affirming Judgment. Received & Filed Oct. 28, 1942. Wm. P. Rowland, Clerk.

[fol. 142] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendices to the briefs for Appellant and Appellee, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of United States of America vs. Frank Tot, Appellant, No. 7961, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 23rd day of November in the year of our Lord one thousand nine hundred and forty-two, and of the Independence of the United States the one hundred and sixty-seventh.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 112] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 569

ORDER ALLOWING CERTIORARI—Filed January 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, limited to the 4th and 5th questions stated in the Government's memorandum.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 113] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 569

STIPULATION WITH RESPECT TO RECORD—Filed January 25, 1943

It is hereby stipulated and agreed by and between the attorneys for the above-named parties that the record filed in this court with the petition for certiorari, consisting of 111 printed pages, may be used in the hearing of this case on the merits without further printing.

It is further stipulated and agreed that the original transcript of testimony and all documentary exhibits may, however, be filed in this court, as additional portions of the record of the case, for the use of either party or the court.

Frederic M. P. Pearse, Counsel for Petitioner.
Charles Fahy, Solicitor General, Counsel for Respondent.

[fol. 114] [File endorsement omitted.]